No. 86-608

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ILLINOIS MANUFACTURERS' ASSOCIATION AND MID-AMERICA LEGAL FOUNDATION,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Section 307(b) of the Clean Water Act authorizes the owner or operator of a publicly owned treatment works ("POTW") to revise the pretreatment requirements for a source discharging any toxic pollutant "to reflect the removal of such toxic pollutant by such works."

In 1984, the Administrator of the Environmental Protection Agency ("EPA"), after extensive rulemaking and consideration of commentary from the public, revised the general pretreatment regulations governing such "removal credit" authority (a) to utilize the average (instead of the average of the lowest 50%) of samples representative of a POTW's annual operations, including seasonal variations, "to provide a more accurate and equitable estimate of the actual removal generally achieved" by a POTW, (b) to eliminate an annual time-based adjustment for combined sewer overflow ("CSO") conditions, and (c) generally to require withdrawal of removal credit authority from a POTW "consistently and substantially" failing to achieve the removal rate on which the credit was based.

In the decision below, the United States Court of Appeals for the Third Circuit struck down the revisions for lack of daily and monthly limits on the discharge from a POTW in the general regulations. The court further ruled that EPA had not established comprehensive guidelines for sludge use or disposal under Section 405 of the Act sufficient to permit any removal credit under Section 307 (b). The questions presented are:

1. Whether the decision of the court of appeals improperly upset EPA's construction of the Act, thereby disrupting a key aspect of the control of water pollution.

2. Whether the challenge of EPA's decisions not to include daily and monthly limits on the discharge from a POTW in general regulations and not to complete more comprehensive sludge guidelines before allowing the exercise of removal

credit authority, constituted alleged failures to perform non-discretionary duties within the jurisdiction of the district courts, not the courts of appeals, under Section 505 of the Act.

PARTIES

The list of parties set out in the prior petition for a writ of certiorari to review the same judgment, filed by Chemical Manufacturers Association ("CMA") in Docket No. 86-239, is hereby incorporated by reference.

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Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Chicago Association of Commerce and Industry, Illinois Manufacturers' Association and Mid-America Legal Foundation, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit in *National Resources Defense Council, Inc. v. EPA et al.*, No. 84-3530 (3d Cir. 1986).[1]

[1] The prior petition to review the same judgment filed by CMA

(Footnote continued on the following page)

OPINION BELOW

The opinion of the court of appeals is reported at ___F.2d___, and a copy of the slip opinion is reprinted in the appendix to the petition in No. 86-239 (*"CMA App.*) at A-1 which is incorporated by reference.

JURISDICTION

The judgment of the court of appeals is dated April 30, 1986. Timely petitions for rehearing were denied on July 11, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

This case involves Sections 307(b)(1) and 405(d) of the Clean Water Act, 33 U.S.C. §§1317(b)(1) and 1345(d) (1982), which are set out as Exhibits A and B, respectively, in the appendix to the opinion below. CMA App. at A-55 and A-56. The 1984 removal credit rule is codified at 40 C.F.R. §403.7 (1985) and is set out as Exhibit C in the appendix to the opinion below. CMA App. at A-57.

STATEMENT OF THE CASE

Petitioners intervened in the proceedings below to present the interest of commercial and industrial enterprises whose process wastewater is entitled to the tertiary treatment provided at the treatment plants of the Metropolitan Sanitary District of Greater Chicago (the *"Chicago POTW"*) in reasonable and workable removal credits. Similarly situated enterprises throughout the nation are also confronted with the

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1 *(Continued)*

in Docket No. 86-239 focuses on the requirement for comprehensive sludge regulations. Because we believe that review should be granted in No. 86-239, the matters related to sludge regulations set out in that petition will be incorporated by reference and not repeated herein.

unworkability of prior removal credit rules for large and well-run POTWs.

The Chicago POTW is a tax supported unit of local government and the trustees of the district are elected by the general public. Historically, Chicago has done much to protect the waters within its jurisdiction. It has reversed the flows of the Chicago and Calumet Rivers to protect the waters of Lake Michigan. The Chicago POTW prohibits the discharge of sewage or industrial process waters into the Lake Michigan basin and operates seven modern treatment plants sized and designed to treat the industrial wastewater of all facilities within its jurisdiction before discharge into waters of the United States flowing towards the Mississippi. As a result, fishable, swimmable and drinkable water has long been a reality, not a goal, in Chicago.

In 1969, The Chicago POTW adopted a Sewage and Waste Control Ordinance which required industrial users to pretreat their process wastewater so that the combined pretreatment by those facilities and the treatment provided by the Chicago POTW itself would meet the standards established by its national pollutant discharge elimination system ("NPDES") permit for discharge to waters of the United States. The Chicago POTW has achieved a 99.6% compliance rate with the effluent limitations of its NPDES permit. Its occasional .4% excedences are almost entirely attributable to minor operational difficulties or unusual natural events interfering with its treatment of domestic, not industrial, waste.

The Chicago POTW found the earlier versions of the removal credit rule so unworkable that it never applied for removal credit authority thereunder even though it already had achieved compliance with applicable effluent limitations utilizing only its own long standing pretreatment ordinance. Petitioners concerns were addressed less to the substantive standards than to the measurement and reporting requirements utilized in earlier versions of the rule, CMA App. at A-24 m.12.

These petitioners challenged the prior regulations on the grounds that they were unworkable and unsurped the authority granted to POTWs by Section 307(b) to revise the pretreatment standards subject to the statutory conditions. Although the court of appeals sustained EPA's authority to condition approval of pretreatment programs under Section 402(b)(8) upon satisfactory removal credit provisions, EPA began a review of those regulations in the course of that litigation. *National Association of Metal Finishers v. EPA*, 719 F.2d 624 (3d Cir.1983), *rev'd in part sub nom, Chemical Manufacturers' Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985).

The 1984 removal credit rule involved in this case is the direct result of EPA's review of the 1981 rule. The 1984 rule establishes revised criteria upon which EPA will condition the approval of a pretreatment program authorizing POTWs to grant removal credits. The removal credits provision modifies the earlier version of the rule in order to accomplish more effectively the dual purpose of Section 307(b) to avoid redundant treatment and yet to ensure that the combination of treatment by the POTW and indirect dischargers will produce a discharge that does not violate the effluent standard that would apply to a toxic pollutant discharged directly.

The new removal credit rule (a) revises the methods used to measure removal and to calculate the consistent removal rate of a POTW on the basis of the average (instead of the average of the lowest 50%) of samples representative of the POTW's annual operations, including seasonal variations, "to provide a more accurate and equitable estimate of the removal generally achieved," (b) eliminates an annual time-based adjustment for CSO conditions, and (c) generally restricts the remedy of a withdrawl of removal credit authority to a POTW "consistently and substantially" failing to achieve the removal rate on which the credit was based. 49 Fed. Reg. 31212 (1984).

Despite the absence of daily or monthly limits on the dis-

charge from a POTW in any prior version of the removal credit rule and notwithstanding the normal application of appropriate daily and monthly limits to each POTW in its NPDES permit, the court of appeals rejected EPA's 1984 revisions for lack of such limits in the general removal credit rule. CMA App. at A-19 to A-34.

> "The reason for requiring polluters to meet daily and monthly limits as well as long term limits is obvious: a single concentrated discharge of a toxic pollutant can do irreparable damage to the ecology of a body of water, killing fish and other life forms."

CMA App. at A-32. Although the court did not address either the lack of daily and monthly limits in any prior version of the rule or the capability of appropriate daily and monthly limits in the NPDES permit of each POTW to prevent such harm, the same concern was reflected in the court's rejection of EPA's elimination of any CSO adjustment and EPA's general restriction of the remedy of a withdrawl of removal credit authority. CMA App. at A-34 to A-46.

Petitioners incorporate by reference the statement of the case generally and with respect to sludge requirements as set out in the CMA petition. The background of the case and the court's sludge requirements are also set out in the opinion below. CMA App. at A-1 to A-15 and A-46 to A-52.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition for a writ of certiorari for three reasons that the Court has traditionally found compelling.

I. The Decision Below Presents Important Questions Of Law That Should Be Settled By This Court.

The court of appeals has decided important questions of federal law with substantial nationwide impact which have not been, but should be, settled by this Court. Moreover, in the circumstances of this case, any possibility of conflict among circuits on the substantive issues of federal clean water law raised

by EPA's 1984 removal credit rule is remote. Accordingly, this Court probably can settle such important questions only on this occasion.

Petitioners incorporate by reference the petition in No.86-239 as to the national impact of the decision below and, in particular, the requirement for more comprehensive sludge regulations, CMA petition at 9-12. The court of appeals requirement for daily and monthly limits or for some compromise effort to provide a substitute for such limits in the general rule will permanently deprive any large and well-run POTW of any credit for a substantial portion of the removal actually achieved by such POTW. The immediate result clearly will be wasteful and redundant treatment. More importantly, the long term effect of such a denial will be to discourage other POTWs from taking the lead in clean water efforts without advance assurance of proper credit for such action.

II. The Decision Below Conflicts With Decisions Of This Court And Numerous Courts Of Appeals In Ruling On The Adequacy Of Regulations Not Reviewable In The Courts Of Appeals.

The decision below conflicts with the decisions of this Court and other circuit courts of appeals in ruling on the decision of EPA not to promulgate daily and monthly limits on discharge from a POTW in the general removal credit rule and on the decision of EPA not to withhold approval of the exercise of removal credit authority under Section 307 (b) of the Act until more comprehensive sludge guidelines have been promulgated under Section 405 of the Act. Even if such decisions could be alleged to involve duties which are not discretionary on the part of EPA, jurisdiction to review the same would lie in a district court under Section 505 of the Act and not in a court of appeals under Section 509 of the Act.

In a district court evidence as to the reasons involved in EPA's decision not to act in some manner which is allegedly not discretionary could be received. Here, the court

of appeals accepted EPA's explanation that the 1984 rule was more accurate and equitable in calculating the amount of actual removal by a POTW for which credit could be given. It rejected that explanation as to the absence of daily and monthly limits which is a matter to which EPA had not addressed it. None of the prior versions of the rule contained daily and monthly limits so that the lack of an EPA explanation for the absence of such limits in its formal commentary on the revisions is hardly surprising. As indicated below, the normal application of daily and monthly limits in the NPDES permit of each POTW readily comes to mind. Neither that possibility nor its adequacy was even considered in the decision below. In a district court such matters could be fully examined and pertinent evidence received.

Petitioners incorporate by reference the petition in No. 86-239 as to the conflict of the decision below with decisions of this Court and other courts of appeals in ruling on the absence of more comprehensive sludge regulations. CMA petition at 13-17. That conflict is also presented by the ruling on daily and monthly limits in the court below.

III. Contrary To Recent Decisions Of This Court, The Decision Below Upsets EPA's Reasonable Construction Of The Act.

Contrary to the recent decisions of this Court in *Chemical Manufacturers Association v. NRDC*, 470 U.S. 116 (1985) and *Chevron v. NRDC*, 467 U.S. 837 (1984), the decision below upsets EPA's reasonable construction of the Act. By holding that daily and monthly limits on the discharge from a POTW must be included in the general removal credit rule, the court of appeals has effectively prohibited any credit for a substantial portion of the actual removal of toxic pollutants by large and well-run POTWs. The most cursory review of EPA's explanation for the 1984 rule clearly indicates that the revisions were focused on problems created by the difficulty of measurement at the lowest levels of concentration, not the highest. Proper calculation factors for samples with concentra-

tions below the level of measurability had presented a particular problem. The court of appeals, however, focused on the possibility of "a single concentrated discharge of a toxic pollutant" without daily and monthly limits in the general rule. CMA App. at A-32.

Prior versions of the removal credit rule, in an unanalytical effort to require a consistency of removal that could be achieved virtually all of the time, had limited credit to the removal actually achieved in 95% and, later, 75% of the samples representative of a POTW's annual operations. CMA App. at A-21 to A-25. The difficulties with that approach were numerous. It did nothing to limit "a single concentrated discharge." Concentrated discharges between a source and the POTW treatment plant are confined to the POTW sewer system. Discharge from the POTW can be, and traditionally has been, regulated directly with daily and monthly limits in the NPDES permit for each POTW. The earlier efforts at some form of short term limit in the general rule did, however, result in credit significantly and unnecessarily below "the removal" actually achieved by a POTW as authorized by Section 307(b) of the Act. Such provisions clearly failed to avoid wasteful and redundant treatment by both indirect dischargers and POTWs.

EPA's construction of the Act in the 1984 removal credit rule is clearly reasonable. It avoids the difficulties admittedly involved in prior versions of the rule and simply does not lead to the difficulties asserted by the court of appeals because daily and monthly limits can be, and normally are, included in the NPDES permit for each POTW. Petitioners incorporate by reference the petition in No. 86-239 as to EPA's reasonable construction of the Act with respect to the sludge requirements of Section 307(b). CMA petition at 17-22.

Finally, it should be noted that EPA's general restriction of the remedy of a withdrawal of removal credit authority to a POTW "consistently and substantially" failing to achieve the removal rate on which the credit is based does not allow for lengthy violations of the Act. Any limit in a NPDES permit

may be properly and promptly enforced. Unusual or sporadic operational difficulties at a POTW should hardly require expensive and redundant pretreatment facilities at each source utilizing the system as an ordinary remedy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Nos. 86-239 and 86-608

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OCTOBER TERM, 1986

CHEMICAL MANUFACTURERS ASSOCIATION, PETITIONER

v.

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CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 307(b)(1) of the Clean Water Act, 33 U.S.C. 1317(b)(1) authorizes the Environmental Protection Agency (EPA) to promulgate pretreatment standards applicable to industrial discharges into publicly owned treatment works. Section 307(b)(1) also provides that EPA may permit revision of pretreatment requirements to reflect removal of toxic pollutants achievable by publicly owned treatment works as long as those "removal credits" do not prevent sludge use or disposal by such works in accordance with Section 405 of the Act, 33 U.S.C. 1345. The questions presented are:

1. Whether the court of appeals exceeded its jurisdiction, conferred by Section 509(b)(1) of the Clean Water Act, 33 U.S.C. (Supp. II) 1369(b)(1), in ruling that EPA could not promulgate a removal credit rule under Section 307(b) of the Act because EPA had not yet promulgated comprehensive sludge regulations under Section 405 of the Act.

2. Whether EPA may allow removal credits under Section 307(b)(1) prior to promulgating comprehensive sludge regulations pursuant to Section 405.

3. Whether the court of appeals erred in setting aside EPA's determination that, for the purposes of allowing removal credits, the consistent rate of removal of pollutants by publicly owned treatment works can be measured by the average rate of removal achieved by the works.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (86-239 Pet. App. A1-A69) is reported at 790 F.2d 289.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1986. The petition for a writ of certiorari in No. 86-239 was filed on August 15, 1986. The petition for a writ of certiorari in No. 86-608 was filed on October 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of Sections 307(b)(1) and 405(d) of the Clean Water Act, 33 U.S.C. 1317(b)(1) and 1345(d), are set forth in the appendix to the petition for a writ of certiorari in No. 86-239 (Pet. App. A55-A57).

STATEMENT

1. This case concerns the validity of pretreatment standards promulgated by the Environmental Protection Agency (EPA) pursuant to Section 307(b) of the Clean Water Act, 33 U.S.C. 1317(b). The Clean Water Act, 33 U.S.C. (& Supp. II) 1251 *et seq.*, divides industrial facilities into two groups: direct dischargers into the waters of the United States and indirect dischargers into sewer systems that lead to publicly owned treatment works (POTWs). Direct dischargers are regulated through the National Pollutant Discharge Elimination System permit program (NPDES or Section 402 permit, 33 U.S.C. 1342). The terms and conditions of a NPDES permit are governed by effluent limitations guidelines (see 33 U.S.C. 1314) and by relevant state water quality standards (see 33 U.S.C. 1312). POTWs also are regulated by the NPDES permit system, and for some pollutants that industrial plants discharge, POTWs provide a level of treatment that is equiva-

lent to that required of direct dischargers under the industrial NPDES program.

Congress, however, recognized that POTWs generally were not designed to treat all forms of industrial pollutants. In Section 307(b), Congress directed the Administrator to issue regulations "establishing pretreatment standards" for "those pollutants which are determined not to be susceptible to treatment" by POTWs or "which would interfere with the operation" of POTWs. Congress also recognized that POTWs often do remove at least some offending pollutants. Hence, Congress also authorized POTWs to grant industries "removal credits"—*i.e.*, revisions to the applicable pretreatment standards to reflect the level of pollutant removal by the POTWs (*ibid.*). Under Section 307(b)(1), these credits are available (1) if the combined level of treatment by the indirect discharger and the POTW is equivalent to the effluent limitations imposed on the comparable direct discharger and (2) if the granting of a credit does not "prevent sludge use or disposal" in accordance with Section 405 of the Act (33 U.S.C. 1345). Section 405, in turn, addresses disposal of sewage sludge. Section 405(e) states that the manner of disposal or use of sludge is a local determination, but use or disposal may not violate guidelines established by the EPA Administrator. Section 405(d) states that the Administrator "shall develop and publish * * * regulations providing guidelines for the disposal of sludge."

In 1979, EPA first promulgated sludge criteria pursuant to Section 405(d) for landfilling, land application, and incineration. See 44 Fed. Reg. 53460 (1979) (codified at 40 C.F.R. Pt. 257). Sludge disposal is also regulated by a variety of statutes de-

pending upon the method of disposal. For example, ocean dumping of sludge requires a permit under the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.*, and sludge incineration is regulated by Section 111 of the Clear Air Act, 42 U.S.C. 7411. EPA has consistently interpreted the Section 307(b) requirement that removal credits not prevent the use or disposal of sludge to mean that whatever use or disposal the POTWs make of their sludge, they must comply with all applicable federal, state, and local requirements, not just whatever guidelines EPA may have explicitly promulgated under Section 405(d). See 43 Fed. Reg. 27749 (1978); 40 C.F.R. 403.7(a)(3)(iv).

2. In 1978, EPA promulgated General Pretreatment Regulations that established the administrative framework for all indirect dischargers, including provision for removal credits (see 43 Fed. Reg. 27736 (1978)).[1] The Natural Resources Defense Council, Inc. (NRDC) and various industry groups sought review of those regulations in the Court of Appeals for the District of Columbia Circuit. This litigation was stayed pending a settlement agreement with the industry petitioners in which EPA agreed to propose changes to the 1978 regulations. EPA subsequently published revised regulations on January 28, 1981 (see 46 Fed. Reg. 9404), which both NRDC and industry groups challenged by filing petitions for review that were heard in the Third Circuit. In *National Ass'n of Metal Finishers* v. *EPA (NAMF)*,

[1] EPA has also promulgated categorical regulations for many industries to establish pretreatment standards for the pollutants discharged by those industries. EPA plans to promulgate additional categorical regulations for several industries.

719 F.2d 624 (1983), rev'd in part *sub nom. Chemical Manufacturers Ass'n* v. *NRDC*, 470 U.S. 116 (1985), the Third Circuit upheld the removal credit provisions of the regulations but set aside other portions of the regulations, including the "fundamentally different factor" variance provision for pretreatment standards. The latter ruling was reversed by this Court in *Chemical Manufacturers Ass'n.*

In 1984, EPA promulgated revisions to the removal credit provisions of the pretreatment regulations (see 49 Fed. Reg. 31212). These revisions, inter alia, (1) changed the measure of "consistent removal" of pollutants, for the purpose of calculating the appropriate credit, from removal rates attained at least 75% of the time to average removal rates; (2) eliminated the adjustment for storm water bypass of the POTW; and (3) provided that removal credit authorization would not be withdrawn during the effective period of a POTW's NPDES permit, except in instances of substantial under-removal of pollutants. During the comment period, NRDC claimed that EPA should not authorize removal credits because a comprehensive set of Section 405 sludge regulations had not been promulgated (86-239 Pet. App. A6-A7).

On review, the Third Circuit held that EPA's removal credit rule was arbitrary and capricious in several respects (86-239 Pet. App. A1-A55).[2] First, the court ruled that the rule did not provide for consistent removal of pollutants equivalent to the removal achieved by direct dischargers. The court

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[2] Petitioners are the Chemical Manufacturers Association, Chicago Association of Commerce and Industry, Illinois Manufacturers Association, and related entities that intervened as respondents in the court of appeals.

found that basing credits on average removal rates achieved by POTWs meant that when the plants were operating at below average performance, the dischargers would exceed the daily or monthly effluent limitations applicable to direct dischargers (*id.* at A29). Second, the court disapproved of EPA's decision to ignore the effects of storm water bypasses of the treatment plant. EPA had estimated that such bypasses contributed approximately eight percent of the pollutants discharged by the system and dismissed this effect as de minimis, but the court of appeals disagreed and found that EPA had ignored the variability of this factor among POTWs (*id.* at A41). Third, the court set aside EPA's determination not to withdraw removal credits except for substantial underremoval of pollutants. The court concluded that under that policy the limits imposed on direct dischargers would not be equivalent to the limits imposed on indirect dischargers and POTWs, as required by the Clean Water Act (*id.* at A46). Finally, the court of appeals held that EPA erred in authorizing the issuance of removal credits prior to promulgating a comprehensive set of sludge regulations pursuant to Section 405. The court determined that NRDC was not precluded from raising this challenge by the 90-day review period in Section 509(b) of the Act, 33 U.S.C. (Supp II) 1369(b), even though NRDC might have raised the issue in response to earlier rulemakings (86-239 Pet. App. A49). On the merits, the court noted that EPA had acknowledged that additional sludge rules were necessary. The court also concluded that EPA's "device of incorporating other regulations" did not meet the requirements of Section 405 (86-239 Pet. App. A52).

ARGUMENT

The decision of the court of appeals is erroneous and may impose additional, ultimately unnecessary, costs on industrial indirect dischargers that must comply with pretreatment standards under the Clean Water Act. Nevertheless, we cannot conclude that further review by this Court is warranted, since EPA rulemaking efforts now in progress should eventually alleviate the principal burdens created by the decision.

1. Petitioner Chemical Manufacturers Association (CMA) asserts that the court of appeals lacked jurisdiction under Section 509(b) of the Act, 33 U.S.C. (Supp II) 1369(b), to review the adequacy of the Section 405 sludge regulations. CMA argues, first, that promulgation of regulations under Section 405 of the Act is not one of the "Administrator's action[s]" expressly made reviewable in the court of appeals by Section 509(b) (see Pet. 14) and, second, even if promulgation of Section 405 regulations was reviewable, NRDC's challenge in early 1985 was time-barred because NRDC failed to seek review of the regulations, issued in 1979 and amended in 1981, within 90 days as required by Section 509(b) (see Pet. 17).

We do not believe, however, that this case presents a proper vehicle for considering the claimed limitation on a court of appeals' jurisdiction imposed by Section 509(b). The issue before the court of appeals was not whether to compel the Agency to promulgate regulations under Section 405; such an issue, as petitioner CMA points out (Pet. 15), could only be raised, in the first instance, in a district court. See 33 U.S.C. 1365. Instead, the issue before the court of appeals was whether EPA was authorized by statute

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to adopt a removal credits program under Section 307(b) of the Act. Section 509(b)(1)(C) explicitly provides that "[r]eview of the Administrator's action * * * in promulgating any * * * pretreatment standard under section 307 * * * may be had [in the court of appeals]," and hence, apart from timeliness concerns, we do not dispute that the court of appeals had jurisdiction over NRDC's challenge to the removal credit rule.

Second, although we disagree with the court of appeals' ruling that NRDC's challenge to the removal credit program is timely,[3] that ruling is limited to the unusual circumstances presented by this case and it is, therefore, relatively unimportant. As the court of appeals observed, Section 509(b) permits late challenges to administrative actions "on 'grounds which arose after' " the 90-day period for petitioning for review has expired (86-239 Pet. App. A49). While we disagree with the court's finding that the lengthy delay in promulgating additional Section 405 regulations qualified NRDC's challenge under this exception (*ibid.*), that determination is not of sufficient significance to warrant this Court's review.[4]

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[3] We argued below that NRDC's lawsuit was untimely because the legal basis for NRDC's current challenge to the removal credit provision—the absence of comprehensive Section 405 sludge guidelines—had existed as well in 1978 (when EPA first promulgated removal credit regulations) and NRDC had failed to assert that ground in its earlier challenge to the 1978 pretreatment regulations.

[4] We strongly disagree with the court of appeals' suggestion (86-239 Pet. App. A48) that the changes made by the 1984 rule and the reprinting of the rule in its entirety authorized a challenge after the 90-day period set forth in Section 509(b) to removal credit provisions that were not changed in 1984.

2. Petitioner CMA also asserts (Pet. 17, 22) that the court of appeals' decision to set aside EPA's reasonable, long-standing interpretation of the Clean Water Act was contrary to the rationale of *Chemical Manufacturers Ass'n* v. *NRDC*, 470 U.S. 116 (1985), and *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). We agree that the court of appeals should have deferred to EPA's interpretation of the relationship between Section 405 sludge regulations and the removal credits provisions of Section 307(b). The court of appeals' blanket reliance (86-239 Pet. App. A31) on the Senate Report (S. Rep. 95-370, 95th Cong., 1st Sess. 57-58 (1977)) to support its interpretation is, moreover, misdirected because the Conference Committee substantially rejected the Senate version of the relevant provisions when the Committee fashioned the Conference bill ultimately enacted in 1977. See H.R. Conf. Rep. 95-830, 95th Cong., 1st Sess. 86-88 (1977).

We also share petitioner CMA's concern that the court of appeals' decision threatens to impose hardships on the regulated community. By forbidding removal credits in the absence of more comprehensive Section 405 sludge guidelines, the court of appeals' decision will force some individual indirect dischargers, which must comply now or in the near future with categorical pretreatment standards, to invest in pollution control systems that may ultimately be unnecessary once EPA has promulgated Section 405 sludge guidelines and made removal credits available.

Nevertheless, we do not urge further review. It is our view that, ultimately, disruption to the pretreatment program can be substantially cured by promulgation of the Section 405 regulations required by the court of appeals. As noted by petitioner CMA (Pet.

11-12), the EPA regulatory agenda had Section 405 regulations scheduled for promulgation in September 1987. The Agency, however, will not be able to meet that timetable. The earliest it now expects to be able to *propose* Section 405 regulations is August 1987. This rulemaking is one of the most complex on which the Agency is working; it raises issues that affect many of the Agency's programs under a host of federal environmental laws. We acknowledge that the unavailability of removal credits during the interim will impose a significant impact on some members of the regulated community. Because, however, the Agency is presently engaged in the process of filling the regulatory gap perceived by the court of appeals, we do not believe that the legal issues presented warrant further review.

3. Petitioners Chicago Association of Commerce and Industry, et al. (CACI), also seek review of that portion of the court of appeals' ruling that struck down the use of POTWs' average removal rate to calculate the appropriate "removal credit" (86-608 Pet. 4). Petitioner CACI asserts that the court of appeals' decision mandates compliance with the monthly and daily discharge limitations imposed on direct dischargers (*id.* at 5). We believe that the relationship between the effluent limitations in a direct discharger's NPDES Permit and the calculation of allowable removal credits available to an indirect discharger is quite complex, given the existing methodology for calculation of POTW removal rates. The court of appeals' decision is quite explicit in ruling that the use of average removal rates to calculate removal credits does not provide for consistent removal of pollutants equivalent to the level of treatment required of direct dischargers (86-239 Pet. App.

A46). Precisely what showing of consistent removal would be required should EPA promulgate new removal credit regulations, however, is not clearly stated in the court of appeals' opinion.[5] In these circumstances, we believe it appropriate to await the judicial response to the promulgation of new regulations rather than for this Court to undertake review of the issue now.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1986

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[5] We note that in *NAMF* v. *EPA*, 719 F.2d 624 (3d Cir. (1983)), the court of appeals upheld removal credit regulations that were based on the removal rates achieved by the POTW 75% of the time.

* The Solicitor General is disqualified in this case.

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IN THE

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OCTOBER TERM, 1985

THE STATE OF ILLINOIS,

Petitioner,

vs.

ALBERT KRULL, et al.,

Respondents.

On Writ Of Certiorari To The
Supreme Court Of Illinois

REPLY BRIEF FOR PETITIONER

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No. 85-608

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REPLY BRIEF FOR PETITIONER

ARGUMENT

THE EXCLUSIONARY RULE WAS IMPROPERLY INVOKED IN THE LOWER COURT WHERE THE PREDICATE SEARCH WAS AUTHORIZED BY A PRESUMPTIVELY VALID STATUTE ONLY LATER FOUND TO VIOLATE THE FOURTH AMENDMENT.

A.

Application Of The Exclusionary Rule Is Unwarranted Where A Search Or Seizure Was Conducted In Reasonable Reliance On A Statute Subsequently Ruled Invalid Under The Fourth Amendment.

In discussing petitioner's argument that the sanction of evidentiary exclusion is not appropriately directed at legislative bodies, respondents point out that the enactment of one unconstitutional statute may affect numerous individuals. (Brief for Respondents at 15-17) This concern was addressed by analogy in *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 3488 (1984), where this Court noted that although searches conducted pursuant to INS regulations may be broad in scope, their highly repetitive character and the agency's consolidated status enhance the possibility of injunctive and declaratory relief, thereby undermining the deterrent value of the exclusionary rule. Due to the nature of statewide legislation and the legislative process, the existence of a particular statute is even less likely to remain unchallenged by persons potentially affected by its enactment.[1]

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[1] Respondents accuse petitioner of attempting to "prevent a citizen from effectively vindicating his constitutional rights by use of the suppression remedy" and of suggesting that any need to remedy fourth amendment violations is satisfied by the availability of injunctive and declaratory relief to financially capable businesses. (Brief for Respondents at 17, 18, 20) In *United States v. Leon*,

(Footnote continued on following page)

Respondents also emphasize the district court's finding in *Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981), that abuses had occurred during administrative inspections ostensibly conducted pursuant to Ill. Rev. Stat., ch. 95½, § 5-401(e) (1979). (Brief for Respondents at 15-17) However, even if it is assumed that some police misconduct can be demonstrated in the enforcement of a specific regulatory enactment, such a showing is largely irrelevant to the question of whether application of the exclusionary sanction is necessary to deter the legislative branch as well as law enforcement. Indeed, respondents themselves do not suggest that the Illinois legislature amended section 5-401(e) as a result of the exclusion of evidence in any prosecution. Rather, it expeditiously "followed the advice of the District Court and reenacted the statute to remedy the constitutional deficiencies set forth in the District Court opinion." (Brief for Respondents at 19) This recognition hardly squares with respondents' suggestion (see Brief for Respondents at 27, n. 12 and accompanying text) that without the threat of evidentiary exclusion, legislatures will not be concerned with the enactment of constitutional laws and the amendment of those found invalid by even a single federal judge.[2]

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[1] *continued*
468 U.S. 897, 104 S.Ct. 3405 (1984), this Court reiterated that the exclusionary rule "is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered.' " 104 S.Ct. at 3412 [quoting *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting)]. Accordingly, petitioner did not note the availability of declaratory relief to certain citizens as an alternative personal "remedy" to application of the exclusionary sanction, but only as one practical means by which fourth amendment law may develop. (See Brief for Petitioner at 11, n. 3)

[2] Respondents credit petitioner with the arguments that the remedial purposes of the statute would be interfered with by application of the exclusionary rule and that no industry abuses have occurred during inspections conducted pursuant to section 5-401(e).

(Footnote continued on following page)

Ultimately, respondents do not strongly urge that use of the exclusionary rule is essential or even likely to deter legislators. Rather, relying upon *Kolender v. Lawson*, 461 U.S. 352, 362, n. 1 (1983) (Brennan, J., concurring), *Michigan v. DeFillippo*, 443 U.S. 31 (1979), *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984), and *Dunaway v. New York*, 442 U.S. 200 (1979), they argue that where the legislature has chosen to provide for warrantless

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[2] *continued*
(Brief for Respondents at 18, 28) While petitioner noted the importance of the remedial purpose sought to be protected by the regulatory scheme, petitioner did so only in explaining why Detective McNally's belief in the statute's validity was not clearly unreasonable. (Brief for Petitioner at 19)

Neither has petitioner found it necessary to quarrel with Judge Shadur's findings of abuse in *Bionic*, for his July 6 opinion could not have addressed the specific search at issue here. Respondents represent that their criminal prosecution and the *Bionic* case were "related" at the time of the district court's ruling because respondent Krull had filed a complaint for declaratory and injunctive relief on the previous day in *Krull, et al. v. Fahner, et al.*, No. 81-C-4907 (N.D. Ill.), which was consolidated with *Bionic*. (Brief for Respondents at 3, 4, n. 2) Because these facts nowhere appear in the record before this Court, petitioner's counsel inspected the docket sheet of that case, which reflects that respondent Krull's complaint was filed without issuance of summons on August 27, 1981, and that he moved for consolidation with *Bionic* one month later. To the extent that respondents otherwise deem it relevant that Judge Shadur found field officers to have exercised unbridled discretion under section 5-401(e), petitioner would note, as did the seventh circuit in *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072, 1080, n. 3 (7th Cir. 1983), that a pattern of illegal conduct was never alleged there and the abuses in question occurred prior to amendment of the statute. Petitioner is cognizant of the suggestion by this Court in *Lopez-Mendoza*, 104 S.Ct. at 3490, and by Justice Blackmun in *Leon*, 104 S.Ct. at 3424 (Blackmun, J., concurring), that conclusions concerning the exclusionary rule's value in deterring police misconduct may be reassessed in accord with experience. However, there presently exists no significant reason for believing that officers conducting administrative searches under the Illinois Vehicle Code have acted or will potentially act so lawlessly as to justify the suppression of reliable evidence even where a particular search was conducted in objectively reasonable good faith.

searches not based upon probable cause, it must be held to "higher standards" because the use of tainted evidence is more likely to compromise "the integrity of the courts and the sanctity of the Constitution." (Brief for Respondents at 23-26)

Petitioner does not here find it necessary to dispute Justice Brennan's position in *Kolender* or in *DeFillippo*, 443 U.S. at 43 (Brennan, J., with whom Marshall, J., and Stevens, J., join, dissenting), that States may not authorize police conduct which trenches upon fourth amendment rights regardless of whether police act pursuant to a substantive or procedural statute. Nor does petitioner find it necessary to deny that the Illinois legislature in the present case failed in its duty to enact an administrative inspection scheme predictable in its application so as to provide an adequate substitute for a warrant. However, in view of this Court's clear approval of warrantless administrative searches conducted under a properly drawn statute, petitioner is unable to discern why the introduction of evidence despite an error committed by the legislative branch in drafting a statute compromises judicial integrity any more than the use of evidence despite judicial error in drafting a warrant. Arguably, the converse conclusion could be drawn. *See United States v. Janis*, 428 U.S. 433, 458, n. 35 (1976) ("[t]he primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution").

In any event, *Leon* did not, as respondents repeatedly state (Brief for Respondents at 8, 9, 13, 14, 23, 24, 29), reaffirm the use of the exclusionary rule in cases where authorities have acted in reasonable reliance on a procedural statute.[3] Rather, this court merely noted that "[t]he *substantive* Fourth Amendment principles announced in

[3] Neither are respondents accurate (Brief for Respondents at 9, 11) in characterizing *DeFillippo*'s dicta as the holding of the case.

those cases are fully consistent with our holding here." 104 S.Ct. at 3415, n. 8 (emphasis supplied). And most certainly *Leon* did not suggest that, in assessing the need to apply the exclusionary rule in the context of procedural statutes, the "focus" should be upon considerations of judicial integrity rather than the deterrent policy of the rule. (Brief for Respondents at 24) Indeed, *Leon* specifically recognized that while courts "must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." 104 S.Ct. at 3420, n. 22 [quoting *Stone v. Powell*, 428 U.S. 465, 485 (1976)].

B.

The Inspection Of Respondent Krull's Premises, Authorized By A Long-Standing State Statute Which Existing Law Did Not Clearly Establish To Be Invalid, Was Conducted In Good Faith.

Respondents state that petitioner "attempts to argue that [section 5-401(e)] had withstood numerous prior constitutional assaults." (Brief for Respondents at 20) To the contrary, petitioner's opening brief noted that "before initiation of the present prosecution, the Illinois state courts had had only two occasions to address the reasonableness of searches directed at the premises of dealers licensed to buy and sell used motor vehicles or vehicle parts." (Brief for Petitioner at 17) Although petitioner does not find *People v. Allen*, 407 Ill. 596, 96 N.E.2d 446 (1950), to be squarely on point with the search here (see Brief for Respondents at 21), its rationale would certainly support a belief that the inspection of a licensee's premises is constitutionally permissible on a theory of implied consent.[4]

[4] Respondents attempt to make much of the trial judge's finding and the similar stipulation reproduced at J.A. 38, 39 that respon-

(Footnote continued on following page)

Also in support of their contention that section 5-401(e) did not enjoy a strong presumption of constitutionality, respondents point to the state of the law as set forth by this Court and to the fact that a complaint attacking the statute had been filed in *Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F.Supp. 582 (N.D. Ill. 1981), at the time of the July 5, 1981, search. (Brief for Respondents at 21, 22) Petitioner's opening brief has already outlined in detail why precedent of this Court did not clearly establish the statute to be invalid; absent other reasons for the authorities to believe the statute unconstitutional, the pendency of *Bionic* must be deemed immaterial, particularly where substantial caselaw to the contrary existed. (See Brief for Petitioner at 17-20) Despite respondents' suggestion (Brief for Respondents at 22, n. 10), petitioner does not take the position that authorities act in good faith whenever a search or seizure is made pursuant to a specific statute not yet declared unconstitutional. However, where no extant decisions of this Court or those of the local state or federal courts clearly establish similar legislation to violate the fourth amendment, the presumptive validity of the statute without question remains intact absent highly unusual circumstances not present here. (See also p. 11, n. 8, *infra*.)

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[4] *continued*
dent Lucas did not consent to the inspection at issue here. (Brief of Respondents at 10, 21, 31, 32) While petitioner does not find it necessary to dispute that Lucas merely acquiesced in the search "because he had no choice but to allow the officer to look around under duress of the Statute" (J.A. 20, 30), there has never been any suggestion that Lucas' consent was otherwise involuntary. *See United States v. Biswell*, 406 U.S. 311 (1972) (consent irrelevant where licensee submits to lawful authority exercised without use of unauthorized force). Having found the statute unconstitutional, the judge could not rely on a theory of implied consent to justify the search. Conversely, in emphasizing the implied consent provisions of the predecessor to section 5-401(e) and in upholding the search conducted there, the Illinois Supreme Court in *Allen* implicitly placed its imprimatur on the statute.

Respondents' Statement of the Case and supporting argument that the police officers here did not act in compliance with the Illinois Vehicle Code contain several serious factual misrepresentations. Contrary to their assertion (Brief for Respondents at 5, 31), the trial court initially found Detective McNally's inspection of respondent Krull's premises to have been authorized by section 5-401(e): "Now, this prosecution is commencing based on a search that was conducted under a Statute which allowed it at the time it was made. It was a permissible activity." (J.A. 20) Indeed, the sole contention advanced in respondent Krull's Motion to Suppress was that "[t]he instant search was invalid because the *statute authorizing the search* was found unconstitutional." (J.A. 16) (emphasis supplied) Also contrary to respondents' assertion (Brief for Respondents at 5), the trial court did not even intimate the statute to have been violated before the case reached the Appellate Court of Illinois. (See J.A. 18-29) Therefore, while petitioner certainly agrees that the appellate court "did not disturb the trial court's finding[ ]" as to whether "Officer McNally exceeded the scope of his authority in conducting the search" (Brief for Respondents at 6), the finding left intact directly contradicted that represented by respondents.[5]

Neither did the appellate court remand the case for a determination of whether the good faith exception should be applied in the present context. (See Brief for Respondents at 6) Rather, remand was for the purpose of (1) eliciting a factual determination on Officer McNally's good faith "so that we might evaluate the State's claim", and to provide the trial court with the opportunity to reconsider (2) the constitutionality of the statute and (3) re-

[5] Respondents, it should be noted, did not file a brief in the appellate court. (J.A. 23)

spondent Mucerino's standing. (J.A. 25, 26) (emphasis supplied) The trial judge did dispose of "two major considerations" of the appellate court on remand, reiterating his belief that section 5-401(e) is unconstitutional and that respondent Mucerino had standing to contest the search. (J.A. 32, 33) However, when specifically discussing the issue "we have to address directed by the Appellate Court as a result of the Gates' case", the judge stated only that the decision, involving a search pursuant to warrant, was inapplicable here. (J.A. 32, 34, 35) Although the initial comments made by the judge at the hearing could be read to reflect a concern that Officer McNally exceeded the scope of section 5-401(e) (see J.A. 29), it is not at all clear that he ever made an actual finding to that effect.

Finally, respondents' assertion that the Illinois Supreme Court held the search at issue to have been unauthorized by the statute is preposterous. Page 120 of the official reports, to which respondents cite (Brief for Respondents at 30, n. 13), addresses only whether valid consent to search was given by respondent Mucerino and whether the result reached below was correct. *People v. Krull*, 107 Ill.2d 107, 120 (1985). *See Bell v. Louisville & Nashville R.R.*, 106 Ill.2d 135, 148, 478 N.E.2d 384, 389 (1985) (appellate court's order to affirmance need not embrace reasoning of lower court). To the contrary, and as noted in petitioner's opening brief (Brief for Petitioner at 15, n. 5), it must be presumed that the Illinois Supreme Court found the officer's conduct to comport with section 5-401(e).[6]

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[6] Without citation to the record, respondents state that petitioner made no argument to the "appellate court" that the judge's purported finding of exceeded authority was manifestly erroneous. (Brief for Respondents at 31) As already explained, petitioner had no reason to advance the argument in the Appellate Court of Illi-

(Footnote continued on following page)

Even if Detective McNally's search exceeded the scope of that authorized by the Motor Vehicle Code, he "searched only those places and for those objects that it was reasonable to believe were covered by the [statute]." *Leon*, 104 S.Ct. at 3419, n. 19.[7] McNally, as a peace officer, was specifically authorized by section 5-401(e) to inspect respondent Krull's records and sought to do so pursuant to his regular inspection duties. He entered the premises at a "reasonable time", at 10:30 a.m. when the Action Iron and Metal Company was open for business and respondent Lucas was on premises and in charge. Upon request, Lucas tendered to McNally a yellow pad of paper describing vehicles which he had purchased, but stated that he could not presently locate the company's police book. When "[e]very record required to be maintained under this Section" was not produced for McNally in accord with legislative mandate, he received permission from Lucas to inspect vehicles in the company's scrap yard. There, McNally inspected only inventory subject to the record-

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[6] *continued*
nois inasmuch as the trial court had found in petitioner's favor on the issue. And in the Illinois Supreme Court, petitioner repeatedly contended that the search of respondent Krull's premises satisfied the requirements of section 5-401(e). Even if the trial court made a contrary finding, it would have been primarily based upon a construction of the statute and was therefore subject to *de novo* review in the higher court. Indeed, in this Court petitioner does not dispute the historical facts found by the trial judge. *See generally United States v. Maggitt*, 778 F.2d 1029, 1034, 1035 (5th Cir. 1985).

[7] Respondents complain of a similar substitution of "statute" for "warrant" in petitioner's opening brief, stating that it constitutes an attempt to misquote *Leon*. (Brief for Respondents at 14, n. 5) Petitioner, however, is merely attempting to illustrate through *Leon*'s exact language the analogies that may be drawn for our present purposes. The use of brackets properly designates a substitution of words, and certainly all parties and this Court are aware that *Leon* involved searches pursuant to warrant.

keeping requirements. Subsequent to the date of the search, respondent Krull was located by authorities and his records transferred to McNally by Krull's attorney.

Despite McNally's otherwise strict adherence to the inspection procedures outlined by 5-401(e), the trial court appears to have been concerned that McNally's inspection of vehicles other than those designated on Lucas' pad was beyond the scope "of determining the accuracy of required records" under the statute. As noted in petitioner's opening brief (Brief for Petitioner at 15, n. 5), this construction of the statute is ill-conceived. Even if it were correct, however, it was certainly reasonable for Detective McNally to believe that the statute authorized the immediate inspection of premises to verify the accuracy of records to be later tendered. In fact, the trial judge, with whom the Illinois Supreme Court agreed, found that Lucas allowed Detective McNally to do what respondent himself "presumed the officer had a right to do at that time." (J.A. 20); *People v. Krull*, 107 Ill.2d 107, 120, 481 N.E.2d 703, 709 (1985).

In *Massachusetts v. Sheppard*, ____ U.S. ____, 104 S.Ct. 3424 (1984), this Court declined to speculate whether an officer with "unalleviated concerns" about the proper scope of a warrant would be required to notice a blatant variance between the objects of the search designated in the warrant and those identified in the supporting affidavit. *Id.* at 3429, n. 6. In the present case, nothing in the statute itself would have placed Officer McNally on notice that his conduct might not be authorized pursuant to its terms and there exists no other apparent reason for him to have held such a belief. As in *Sheppard*, "[a]n error of constitutional dimensions may have been committed with respect to the [enactment of section 5-401(e)], but it was the [legislature], not the police officer, who made the critical mistake." *Id.* at 3429.

C.

Retroactive Application Of This Court's Rationale In *Leon* Is Compelled Where The Purpose Of The Rule Announced Therein Would Be Otherwise Defeated And Where No Justifiable Reliance On Prior Law Would Be Frustrated.

Citing this Court's decisions in *United States v. Johnson*, 457 U.S. 537 (1982), and *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065 (1985), respondents argue that the good faith analysis of *Leon* cannot be applied retroactively because *Leon* represents a "clear break" from past precedent.[8] While petitioner does not dispute that *Leon* was

[8] Respondents credit petitioner with presenting a "confused" analysis as to whether this Court's decision in *Leon* should be applied retroactively. (Brief for Respondents at 4, n. 3, 33) However, petitioner's opening brief assumed *Leon*'s rationale to potentially impact this case inasmuch as respondents never argued to the contrary in the courts below. While petitioner did footnote the *Johnson* opinion after citation to *United States v. Peltier*, 422 U.S. 531 (1975), it was merely in recognition of the fact that unlike in *Peltier*, this Court in *Johnson* placed little weight on the policies underlying the exclusionary rule in determining whether fourth amendment law should be applied retroactively. Rather, in "rethinking" the general law of retroactivity and in the absence of clear retroactivity precedent, this Court placed primary emphasis on those concerns expressed by Justice Harlan in *Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting). Independent of those concerns, which are relevant to the litigation of any criminal case, the policies underlying the exclusionary rule have without question been determinative when its application as a remedy is at issue.

To the extent that respondents suggest petitioner's position on the merits to be in conflict with *Johnson*'s partial adoption of Justice Harlan's reasoning, petitioner would note that *Leon* rests upon the premise that even where a warrant has been invalidated in a particular defendant's case before trial, he has no right to invoke the exclusionary rule absent objective bad faith. Moreover, *Johnson*'s specific fourth amendment concern that law enforcement officers not be allowed to knowingly engage in dubious constitutional practices pending this Court's resolution of the issue, 457 U.S. at 561, may be addressed in assessing their good faith. Indeed, because the California Supreme Court, along with various

(Footnote continued on following page)

the first case in which a majority of this Court recognized a form of good faith to preclude invocation of the exclusionary rule, analysis of the *Johnson* and *Shea* opinions themselves reveals respondents' reliance on those cases to be severely misplaced. Moreover, virtually every state and federal court finding the issue worthy of discussion has rejected respondents' position.

Johnson and *Shea* both addressed the retroactivity of judicial pronouncements expanding a defendant's constitutional rights. *Johnson* did observe that unanticipated rulings are invariably applied prospectively, but emphasized that regardless of the purposes underlying a particular constitutional rule at issue, such result was "virtually compelled" by law enforcement's reliance on the prior law and by the disruptive effect retroactive application would have on the administration of justice. 457 U.S. at 549. And while this Court in *Shea* remained faithful to *Johnson*'s generic approach to retroactivity questions presented by non-final convictions, it did note retroactive application to be more compelling where the constitutional ruling at issue relates to the integrity of the fact-finding process. 105 S.Ct. at 1070. *See also Johnson*, 457 U.S. at 562, n. 21.

In contrast to decisional law addressed in *Johnson* and *Shea*, the *Leon* opinion restricted a defendant's right to invoke the exclusionary sanction. Therefore, retroactive application of the principles announced therein could have no adverse impact on the administration of justice or betray official reliance on prior precedent. In accord with both

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[8] *continued*
state and federal courts, had held in accord with *Payton v. New York*, 445 U.S. 573 (1980), long before defendant Johnson's arrest, 457 U.S. at 553, n. 15, the same result may have been reached had a good faith analysis been employed.

cases, the purpose of the rule announced in *Leon* argues for retroactive application inasmuch as the decision sought to enhance the fact-finding process by requiring use of the exclusionary sanction only where necessary to substantially further fourth amendment interests. Nor would the purpose of the exclusionary rule itself be undermined by applying the good faith exception retroactively; it would be unreasonable to believe that a peace officer will violate prevailing constitutional norms in the expectation that the rules will be later changed by this Court so as to authorize his conduct. Particularly in view of *Leon*'s rationale, it would be even more incredible to suggest that prospective application of the principles announced there will deter future actions taken in objective good faith.

Respondents answer the above considerations with the complaint that application of the good faith exception would be inequitable because *Leon* leaves unaffected those cases where the government chose not to appeal a suppression order. (Brief for Respondents at 35) This, however, is but a consequence of the established principle of waiver which may independently foreclose a party's right to rely on new law. *See Shea*, 105 S.Ct. at 1070, n. 4. Moreover, respondents' assertion that only they will be required to relitigate their claims in light of *Leon* (Brief for Respondents at 35) is certainly inaccurate; neither defendant Leon nor the defendant in *Massachusetts v. Sheppard*, ____ U.S. ____, 104 S.Ct. 3424 (1984), was allowed to invoke the exclusionary rule as a matter of constitutional law. And numerous courts have already applied

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[9] *See, e.g., United States v. Sager*, 743 F.2d 1261 (8th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1196 (1985); *United States v. Cassity*, 604 F.Supp. 1566 (E.D Mich. 1985); *State v. Brooks*, 201 N.J. Super. 10, 492 A.2d 390 (1985); *People v. Helmquist*, 161 Cal. App. 3d 609, 207 Cal. Rptr. 718 (4th Dist. 1984); *People*

(Footnote continued on following page)

Leon retroactively.[9] *Cf. United States v. Ross*, 456 U.S. 796, 824, n. 33 (1982) ("Any interest in maintaining the status quo that might be asserted by persons who may have structured their business of distributing narcotics or other illicit substances on the basis of judicial precedents clearly would not be legitimate."); *United States v. Johns*, ___ U.S. ___, 105 S.Ct. 881 (1985) (applying *Ross* retroactively without discussion); *Massachusetts v. Upton*, ___ U.S. ___, 104 S.Ct. 2085 (1984) (per curiam) [applying *Illinois v. Gates*, 462 U.S. 213 (1983), retroactively without discussion].

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[9] *continued*
v. Macavoy, 162 Cal. App. 3d 746, 209 Cal. Rptr. 34 (1st Dist. 1984); *Lincoln v. State*, 285 Ark. 107, 685 S.W.2d 166 (1985); *State v. Schaffer*, 107 Idaho 812, 693 P.2d 458 (1984); *United States v. Barker*, 623 F.Supp. 823 (D. Colo. 1985); *United States v. Hendricks*, 743 F.2d 653 (9th Cir. 1984); *United States v. Thornton*, 746 F.2d 39 (D.C. Cir. 1984); *United States v. Segovia-Melgar*, 595 F. Supp. 753 (D.D.C. 1984); *Adkins v. State*, 675 S.W.2d 604 (Tex. App. 8th Dist. 1984). See also the following cases holding that decisions limiting application of the exclusionary rule are fully retroactive: *United States v. Estrada*, 733 F.2d 683 (9th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 168, 194 (1984); *United States v. Freire*, 710 F.2d 1515 (11th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1277 (1984); *Commonwealth v. McCluskey*, 395 Mass. 1003, 479 N.E.2d 672 (1985); *Commonwealth v. Gray*, 503 A.2d 921 (Pa. 1985); *People v. Tisler*, 103 Ill.2d 226, 469 N.E.2d 147 (1984); *State v. Bouchles*, 457 A.2d 798 (Me. 1983).

CONCLUSION

For the foregoing reasons, and those set forth in their opening brief, the People of the State of Illinois respectfully request that the decision of the Illinois Supreme Court suppressing evidence be reversed.

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Nos. 86-239 and 86-608

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CHEMICAL MANUFACTURERS ASSOCIATION,
Petitioner

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
Respondents

CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ET AL.,
Petitioners

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
Respondents

On Petitions for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE NATURAL RESOURCES DEFENSE COUNCIL

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QUESTIONS PRESENTED

1. Whether the Third Circuit correctly held that Sections 307(b)(1) and 405 of the Clean Water Act, 33 U.S.C. 1317(b)(1) and 1345, prohibit EPA from relaxing national pretreatment standards through removal credits without promulgating the sludge regulations which are a precondition to credits.

2. Whether the Third Circuit correctly held that Section 307(b)(1) of the Clean Water Act, 33 U.S.C. 1317(b)(1), authorizes removal credits only for pollutant removal which meets the same standard of consistency that a direct discharger must meet.

PARTIES

In addition to those named in the caption, the parties are: Illinois Manufacturers' Association and Mid-America Legal Foundation (petitioners in No. 86-608) and the U.S. Environmental Protection Agency (respondent).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Nos. 86-239 and 86-608

Chemical Manufacturers Association,
Chicago Ass'n. of Commerce and Industry, *et al.*,
Petitioners,

v.

Natural Resources Defense Council, Inc., *et al.*,
Respondents.

OPINION BELOW

The opinion of the court of appeals (CMA App. A-1 to A-69)[1] is reported at 790 F.2d 289.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of Sections 307(b)(1) and 405(d) of the Clean Water Act, 33 U.S.C. 1317(b)(1) and 1345(d), are reproduced at CMA App. A-55 to A-57. The removal credits provision, 40 C.F.R. 403.7, is reproduced at CMA App. A-57 to A-69.

STATEMENT OF THE CASE

The Clean Water Act, 33 U.S.C. (& Supp. II) 1251 *et seq.*, directs EPA to control two types of industrial polluters: (1)

1. As used herein, "CMA App." refers to the appendix to the petition in No. 86-239. "CMA Pet." refers to the petition in No. 86-239 filed by the Chemical Manufacturers Association. "CACI Pet." refers to the petition in No. 86-608 filed by the Chicago Association of Commerce and Industry, *et al.* "EPA Br." refers to the Brief for the Federal Respondents in Opposition to both petitions.

"direct" dischargers, which pipe toxic wastewater directly into navigable waters, and (2) "indirect" dischargers, which pipe toxic wastes to publicly owned treatment works (POTWs) which, in turn, discharge to navigable waters.

Most POTWs are designed to treat conventional wastes, not industrial toxics. Industrial toxics can damage the POTW, pass through it to rivers and drinking water supplies, or contaminate its sludge. *A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. 690-691 (1978) [hereinafter *1977 Legis. Hist.*]

Congress therefore directed EPA to set national "pretreatment" standards dramatically limiting the toxicity of industrial discharges to POTWs. 33 U.S.C. 1317(b)(1). Congress also told EPA to develop regulations to prevent industrial wastes from contaminating POTW sludge and to encourage productive use (i.e., recycling) of sludge. 33 U.S.C. 1345(d). Finally, because some POTWs can remove some toxics, Congress authorized EPA to approve "removal credits" or adjustments to national pretreatment standards at qualifying POTWs. 33 U.S.C. 1317(b)(1). Industries using these POTWs could then discharge larger quantities of toxics than would otherwise be allowed.

POTWs applying for authority to grant industry credits had to show: 1) that the POTW, in conjunction with industry, could reduce the toxics in its discharge to the same level as a direct discharger, and 2) that reliance on the POTW's treatment system would not produce unacceptably toxic POTW sludge. *Id.*

In 1978 EPA issued, and in 1981, in response to industry criticisms, revised, rules implementing the pretreatment provisions, including the removal credit authority. The Third Circuit upheld the removal credit portion of the rules against industry's challenge. *National Ass'n. of Metal Finishers v. EPA*, 719 F.2d 624 (1983) [hereinafter *NAMF*]. Industry sought this Court's review of some aspects of that decision, but did not take issue with the holding on removal credits. *Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985) (reversing part of *NAMF* unrelated to removal credits).

Despite this seemingly final resolution, a few industry groups continued to criticize the removal credit rule. They argued that many POTWs were uninterested in credits, but might be induced to apply if EPA relaxed the requirements. To appease these concerns, in 1984 EPA relaxed every key component of its removal credit rule, making larger credits possible. CMA App. A-13 to A-14. On review, the Third Circuit held that: 1) the revised rule violated the plain language of the Clean Water Act, and 2) EPA had also acted arbitrarily and capriciously, given the rulemaking record. CMA App. A-19 to A-34 and A-46 to A-52.

The Chemical Manufacturers Association (CMA) seeks review of Part VI of the Third Circuit's decision holding that EPA may not approve removal credits without promulgating the sludge regulations which are a precondition to credits. The Chicago Association of Commerce and Industry *et al.* (CACI) joins CMA's petition and also seeks certiorari of Part III of the Third Circuit's decision holding that EPA's method of calculating a POTW's waste removal must comply with the statutory requirement that indirect dischargers (in conjunction with their POTW) meet the same pollution control standards as direct dischargers.[2] EPA and NRDC oppose both petitions.

REASONS FOR DENYING THE PETITIONS

The Third Circuit's decision does not present issues sufficiently important to warrant this Court's attention, does not conflict with the decisions of this Court or any other Circuit, and is required by both the express language of the statute and the legislative history. Review by this Court is not warranted.

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2. The Third Circuit also found other statutory violations which are not at issue here: 1) EPA ignored untreated sewer overflows in calculating a POTW's toxic waste "removal" and 2) EPA erred by allowing up to eight years of violative discharges before it had to withdraw approval for removal credits. CMA App. A-34 to A-46.

1. THIS CASE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

a. The nub of CMA's petition is likely to be resolved before this Court can decide the case. The petition presents a single issue: may EPA authorize removal credits without issuing the sludge regulations required by Section 405 of the Act? EPA has pledged to resolve this issue by promulgating Section 405 rules. EPA Br. 9-10. Several intermediate rulemaking steps are already complete,[3] and EPA expects to propose the rules by August, 1987 or thereabouts. EPA Br. 10.

Congress[4] or the courts[5] may well force EPA to expedite this schedule. But even if they do not, the central feature of this controversy should dissolve during 1987.[6]

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3. For example, in July 1985, EPA produced an environmental profile document and hazard index for each of 50 toxics in municipal sludge. *Summary of Environmental Profiles and Hazard Indices for Constituents of Municipal Sludge: Methods and Results*, U.S. EPA, Office of Water Regulations and Standards. Last year, EPA sought public comment on proposed rules for state management of the federally mandated sludge program. 51 Fed. Reg. 4458 (Feb. 4, 1986).

4. Last session, both Houses of Congress unanimously passed the Water Quality Act of 1986, which directed EPA to *promulgate* the long overdue Section 405 sludge rules by August 31, 1987. S. 1128, 99th Cong., 2d Sess. §406(a)(3), 132 Cong. Rec. H.10,551 (1986). Although the President pocket-vetoed the bill, the House reapproved the identical legislation by a vote of 406 to 8 this session, H.R. 1, 100th Cong., 1st Sess. §406(a)(3), 133 Cong. Rec. 210 (1987), and Senate leaders have promised similar action, 133 Cong. Rec. S.17-18 (daily ed. Jan. 6, 1987) (statements of Senators Byrd and Dole on S.1, the Water Quality Act of 1987).

5. Section 405(d) of the Act set a 1978 deadline for EPA's sludge rules. Because EPA violated this deadline, a district court, under Section 505(a)(2) of the Act, 33 U.S.C. 1365(a)(2), can compel EPA to issue the rules at the earliest possible date. *See, e.g., NAMF*, 719 F.2d at 642, *rev'd in nonrelevant part, Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985); *Pennsylvania Dep't. of Environmental Resources v. EPA*, 618 F.2d 991, 1000 (3d Cir. 1980).

6. The Clean Water Act and the Administrative Procedure Act together require EPA to seek public comment on the proposed rules. 33 U.S.C. 1345(d) and 5 U.S.C. 553. EPA can issue final rules shortly thereafter. EPA will presumably give high priority to final promulgation of these rules. EPA has said that these rules will "substantially cure" any disruption to the pretreatment program. EPA Br. 9.

b. This case will temporarily affect at most a very small number—possibly only five—POTWs in the country. That is because Congress intended removal credits to be granted sparingly and only under stringent conditions. *See* CMA App. A-31 to A-32. Many POTWs cannot meet these conditions. The few who can are often unwilling to assume legal and financial responsibility for treating industry's wastes. *Id.* at A-24, n.12.

Consequently, only one of approximately 1500 eligible POTWs obtained EPA approval for removal credits which appear to comply with all but Section 405 of the Act; four others have pending applications which may similarly qualify. NRDC Appendix A-1 to A-7.[7]

c. The temporary impact of this case, even on the few affected POTWs, is quite limited. Contrary to CMA's assertion, removal credits are not "integral" to a pretreatment program. The essential components of the program—adequate legal authority, clearly defined administrative procedures, and adequate funding and personnel—had to be in place by July, 1983, long before any POTW sought removal credit authority. 40 C.F.R. 403.8(b) and (f).

The removal credit is simply a discretionary supplement to an otherwise functional program. That is precisely why EPA allows POTWs to apply for removal credit authority at any time — even well into program operation. *See* 40 C.F.R. 403.7(e)(3).

In that sense, this case differs substantially from *Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985). There, EPA argued that, although it rarely granted FDF variances, it nonetheless relied on their availability in establishing BAT and pretreatment standards. Neither EPA nor any petitioner claims

7. Eleven other POTWs received EPA approval to grant removal credits which EPA must now recall for reasons unchallenged by CMA: they either use an incorrect formula for calculating the POTW's pollutant "removal," or they do not account for combined sewer overflows, or both. In addition, ten POTWs have pending applications which fail for the same reasons. *Cf.* NRDC Appendix A-1 to A-7 *with* CMA App. A-19 to A-42. It is uncertain whether any of these POTWs will qualify for, or want, credits when EPA revises its removal credit rules to comply with the other, nonsludge related parts of the Third Circuit's decision.

such sweeping scope here. The pretreatment program could function perfectly well even if the Third Circuit's decision effectively precluded (which it did not), removal credits forever. The only consequence would be that all, rather than most, industries discharging to POTWs would have to meet national pretreatment standards.

d. This case will not affect industry as CMA had projected because of: 1) new developments, and 2) other avenues for relief.

1. CMA had argued that the chemical industry would face pretreatment standards in December, 1986, nine months before EPA issued sludge rules. CMA complained that, during the nine month interval, CMA could not judge its eligibility for removal credits. Hence, CMA would have to design treatment technology to meet standards unmitigated by any removal credit adjustment—or risk violating the statutory three year pretreatment compliance deadline. CMA Pet. 11-12.

EPA has since alleviated CMA's dilemma. EPA postponed pretreatment standards for the chemical industry until August 31, 1987, virtually the identical deadline for proposed sludge rules.[8] EPA also warned that the chemical industry standards may lag even more because of data gaps in that rulemaking record.[9] Hence, CMA will know[10] what its likely removal credit obligations are at the same time as—or in advance of—the date it must begin developing compliance plans.[11]

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8. EPA's deadline for chemical industry pretreatment standards is set by a Consent Order. The district court recently modified the Consent Order to extend the deadline for these standards to August, 1987. *NRDC v. Thomas*, Civ. Nos. 2153-73, 75-012, 75-1698, 75-1267 (D.D.C. Jan. 7, 1987).

9. EPA predicts potential delay due to the lack of any data in the rulemaking record on metals removal at certain chemical plants. *Id.*, Motion to Modify Paragraph 7(b) of Consent Decree.

10. As noted earlier, CMA can bring a district court action to compel EPA to promulgate final sludge rules shortly after the August, 1987 proposal. In addition, Congress or the courts may well force EPA to expedite its current rulemaking schedule. *See* p. 4 and n. 4, 5, and 6, *supra*.

11. CMA speculates, without citation to the record, that removal credits will substantially reduce the industry's compliance costs. CMA Pet. 11. This assumes, contrary to history, that most affected POTWs will both want, and qualify for, credits. It also assumes that the credits will be sufficiently large to

2. Only a small percentage of industrial facilities subject to pretreatment standards have shown any interest in removal credits. The statutory compliance deadline for many of these facilities is already past or soon will be. *See* NRDC Appendix A-8 to A-12. Hence, many seek removal credits not, as CMA suggests, to comply diligently (the date for that is already past), but rather to avoid enforcement for failing to install the same pollution controls as their competitors.[12]

This Court need not invoke its jurisdiction to help Clean Water Act violators escape enforcement. Admittedly, a few facilities may have relied in good faith on removal credits approved prior to the Third Circuit's decision.[13] According to EPA, the forthcoming sludge rules should "alleviate the[ir] principal burdens." EPA Br. 7. Congress may also afford these facilities express relief,[14] but even if Congress does not, they are unlikely

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allow chemical plants to install entirely different, and cheaper, pollution controls than anticipated in the pretreatment standards. There is nothing in the record to support these assumptions. The projected savings from "national" removal credits, CMA Pet. 11, n. 8, refer to rulemaking options which EPA rejected as flatly illegal. *See* 49 Fed. Reg. 31212-31213 (Aug. 3, 1984). They have nothing to do with this case.

12. Many removal credit applications were not filed until less than one year before the industrial compliance deadline. *Cf.* NRDC Appendix A-6 to A-7 *with* NRDC Appendix A-8 to A-12. Credits are then "too late" for an industrial facility which had intended to comply with the deadline because, by then, such a facility would already have purchased its pollution controls. *See* CMA Pet. 12 and n. 9.

13. Categorical pretreatment standards cover roughly 14,000 industrial facilities. EPA had approved credits which comply with all but the sludge requirements of the Clean Water Act for one POTW with only 38 affected facilities. EPA had also approved other credits which violate aspects of the Third Circuit's decision which are unchallenged here. It is unclear whether interest continues in the latter credits, many of which involved facilities with less than a year til their compliance deadline. *See* NRDC Appendix A-1 to A-4 and n. 12, *supra*.

14. Proposed amendments to the Clean Water Act would grant only POTWs with either approved credits or pending credit applications a stay of the sludge requirements of Sections 307(b)(1) and 405(d) of the Act until August 31, 1987, the date by which the bill requires EPA to issue final sludge rules. H.R.1, 100th Cong., 1st Sess. §406(e), 133 Cong. Rec. 211 (1987). See n. 4, *supra*, for a discussion of the status of this legislation.

to suffer. *See , e.g. , General Motors Corp. v. EPA*, 738 F.2d 97, 101 (3d Cir. 1984) (in a closely analogous situation, EPA emphasized that "good faith efforts to achieve compliance will be taken into consideration by the agency in enforcement actions addressed to *specific instances* of noncompliance.")

2. THE THIRD CIRCUIT CORRECTLY DECIDED THAT IT HAD JURISDICTION TO REVIEW THESE RULES.

Below, CMA expressly conceded that the Third Circuit had jurisdiction to review a timely challenge to these rules.[15] Now CMA postulates a directly contradictory theory: that jurisdiction fails because this case allegedly constitutes a challenge to the adequacy of Section 405 sludge regulations. CMA's new-found theory gives rise, in its view, to a conflict between the Third Circuit's decision and general mandates from this and the courts of appeals to stay within statutory bounds on jurisdiction. *See* CMA Pet. 13-16.

EPA disagrees with CMA's new-found theory, as well it should. *See* EPA Br. 7-8. As EPA explains, the issue before the Third Circuit was not whether to compel EPA to promulgate Section 405 sludge regulations. Instead, the Third Circuit had to decide whether Section 307(b) of the Act authorized the pretreatment rules EPA had adopted. Section 509(b)(1)(C) explicitly directs "[r]eview of the Administrator's action . . . in promulgating any . . . pretreatment standard under section 307" exclusively to the courts of appeals. 33 U.S.C. (Supp. II) 1369(b)(1)(C). There can be no question that the Third Circuit properly invoked its jurisdiction.

Both CMA and EPA join in criticizing the timeliness of NRDC's challenge to these rules, though EPA believes that the question turns on the unique facts of this case and is "relatively unimportant." *See* CMA Pet. 16-17 and EPA Br. 8. We agree that the jurisdictional question is tied to unusual facts. However,

15. CMA's Brief to the Third Circuit admitted: "With the exceptions noted in respondent's EPA's brief [i.e., to the timeliness of the case only], *this Court has jurisdiction over this case under §509(b)(1) of the Act*." p. 1 (emphasis added). We discuss CMA's and EPA's objections to timeliness below.

we also believe that the Third Circuit correctly applied the relevant law. Three facts support the Third Circuit's decision.

First, the new rule enabled POTWs to grant more and larger credits, significantly reducing the degree of required pretreatment. CMA App. A-14. This, in turn, forecasted greater sludge contamination, a development sufficient in itself to trigger jurisdiction. *See Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1033 (7th Cir. 1984) ("waiting to see if regulation will really pinch before challenging it in court" is permissible); *Tanner's Council of America, Inc. v. Train*, 540 F.2d 1188, 1196 (4th Cir. 1976) (post-90 day review permissible).

Second, the Third Circuit found that EPA had reproposed for public comment, and then repromulgated, the entire removal credit rule, significantly changing the provisions purporting to implement Section 405 of the Act. CMA App. A-48.

Finally, Section 509(b)(1) of the Act allows challenges based on "grounds which arose after [the] ninetieth day" from promulgation of a rule. 33 U.S.C. (Supp. II) 1369(b)(1). The Third Circuit found: a) EPA had now fallen nine years, rather than one, behind its statutory deadline; b) it was now abundantly clear (as it had not been earlier)[16] that sludge rules were well over a year away from the court's decision; and c) a newly released EPA study and even more recent correspondence from the EPA Administrator to the Chairman of the Senate Oversight Committee documented EPA's failure to issue Section 405 sludge rules. CMA App. A-49 to A-52. These facts afforded the Third Circuit ample bases for jurisdiction.

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16. NRDC could not have raised this issue as to EPA's 1978 rule since, at that time (June 26, 1978), EPA had not yet missed the one-year statutory deadline. When the removal credit rule was reissued in 1981, both EPA and NRDC expected that additional Section 405 regulations would be forthcoming shortly. *See* 46 Fed. Reg. 9404, 9410 (Jan. 28, 1981). NRDC could not then have been charged with knowledge that EPA would completely renege for many more years on its statutory obligation.

3. THE THIRD CIRCUIT CORRECTLY DECIDED THAT THE CLEAN WATER ACT PROHIBITS EPA FROM APPROVING REMOVAL CREDITS IN TOTAL DISREGARD OF SECTION 405 OF THE ACT.

The Third Circuit framed its analysis according to the standard of review articulated in three recent decisions of this Court: *Chemical Manufacturers Ass'n. v. EPA*, 470 U.S. 116 (1985) (interpreting the Clean Water Act); *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984); and *Motor Vehicle Manufacturers' Ass'n. of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). The court afforded EPA "the utmost deference," looking only to see that EPA's interpretation of the Clean Water Act was "sufficiently rational" to be upheld. CMA App. A-7 and A-15 to A-19.

Section 307(b)(1) of the Act states plainly: EPA may authorize removal credits only if they do not "prevent sludge use or disposal by such works in accordance with section 405 of this Act." 33 U.S.C. 1317(b)(1). Section 405, in turn, requires EPA *by December, 1978* to publish

> regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall - (1) identify uses for sludge, including disposal; (2) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs); (3) identify concentrations of pollutants which interfere with each such use or disposal.

33 U.S.C. 1345(d).

There are five major methods of sludge use or disposal.[17] The statute requires EPA to set concentration limits for each of the 100 or so[18] pollutants found in POTW sludge and for each use

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17. The five major methods are: landfill, incineration, land spread, ocean dumping, and distribution and marketing. CMA App. A-50 and n. 26.

18. CMA App. A-50.

or disposal method. EPA issued Section 405 regulations for only two pollutants and then only for two of the five common disposal methods.[19]

CMA argues that EPA can nonetheless authorize removal credits for any pollutant or disposal method. Under CMA's theory, if regulations issued under other statutes cover a POTW's chosen sludge disposal method (and a few do), those regulations can substitute for Section 405 regulations — without so much as a finding by the agency that the other regulations accomplish the objectives of Section 405. If, as is more likely the case, no federal regulations govern the POTW's disposal of sludge contaminated with a particular pollutant, then, CMA theorizes, EPA can grant removal credits unfettered by any of the constraints on sludge disposal in Sections 307(b)(1) and 405 of the Act. CMA Pet. 18-20.

The Third Circuit correctly found that CMA's theory violated: a) Section 405's explicit directive that EPA issue sludge rules for *each* use or disposal option, b) Section 405's equally explicit directive that EPA issue sludge rules for *each* pollutant of concern in POTW sludge, c) Section 405's statutory deadline for sludge rules by December, 1978, and d) "the congressional goal of making sludge into a productive asset rather than a toxic liability." CMA App. A-10 and A-46 to A-52. In short, the court

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19. *Id.* at A-51 to A-52. CMA claims that EPA has issued sludge rules under both Section 405 and other federal statutes. CMA Pet. 19 and n. 16. This is relatively simple to refute. The Court need only compare the content of the rules mandated by Section 405(d) with those CMA cites. Section 405(d) requires EPA to regulate *each* use or disposal method and all pollutants which interfere with such methods. CMA cannot name a *single pollutant* regulated for *each* disposal method. No regulation indicates what concentrations will prevent beneficial *use* of sludge. CMA App. A-51. And only one of EPA's rules—the limited rule referenced in the text—even purports to be issued under authority of Section 405(d). 40 C.F.R. Part 257.

In any event, the EPA Administrator has twice acknowledged EPA's failure to promulgate the Section 405 rules. CMA App. A-51 to A-52. EPA's own report concedes: "no meaningful sludge criteria" exist. Joint Appendix at 200, 204, *NRDC v. EPA*, 790 F.2d 289 (3d Cir. 1986) (No.84-3530). And EPA has now promised to promulgate the nonexistent Section 405 regulations. EPA Br. 9-10.

held that EPA cannot ignore the plain language of Section 405 and nonetheless purport to act "in accordance with" that section as the Clean Water Act commands.[20]

Although the Third Circuit did not discuss the legislative history,[21] that history confirms the court's Opinion. Congress wanted removal credits, by definition, to reflect pollutant "reduction" or "removal." *1977 Legis. Hist., supra*, at 271, 461 (Conf. Rep. and Sen. Muskie, respectively). Congress decided that pollutants *"are not considered to be removed"* where they contaminate sludge. *Id.* at 690 (S. Rep.) (emphasis added). Without Section 405 rules, EPA has no way of knowing whether pollutants simply move from water to sludge in direct violation of Congress's purpose. *See id.* at 691 (S. Rep.). Hence, EPA cannot say there is any "removal" — or any basis for a credit.

CMA cites Section 405(e) of the Act, 33 U.S.C. 1345(e), which gives POTWs authority to decide how to dispose of sludge provided they comply with any EPA guidelines. CMA reads that section as negating Congress's express directive to EPA, in subsection 405(d), to issue sludge rules by 1978. CMA Pet. 20-22.

Subsection (e) is wholly consistent with the clear and specific language of Section 405(d). Section 405(e), unlike subsection (d), took effect immediately on enactment. It gave POTWs interim authority to dispose of sludge until EPA issued sludge guidelines. It recognized that municipal treatment inevitably

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20. CMA takes issue with the Third Circuit's language indicating that Section 405(d) mandates a "comprehensive framework" of rules. CMA Pet. 18-22. The words "comprehensive framework" are simply a shorthand description of the requirements clearly and specifically set forth in Section 405(d). No regulations exist which meet the requirements of Section 405(d). *See* n. 19, *supra*.

21. EPA criticizes the court's "blanket reliance" on the Senate Report to decide the relationship between Section 307(b) and Section 405. EPA Br. 9. EPA is wrong on two counts. First, the court discusses the Senate Report solely in reference to an entirely different point raised by CACI's petition (i.e., the degree of pollutant removal needed to justify a credit). *See* CMA App. A-31. That discussion is not relevant to Part VI of the Court's Opinion on sludge requirements. Second, contrary to EPA's suggestion, the Conferees did, in fact, adhere to the Senate's concern that pretreatment standards require actual pollution "reduction," not mere shifting of toxics to POTW sludge. *1977 Legis. Hist., supra*, at 271-272 (Conf. Rep.).

produces sludge; POTWs had to dispose of this sludge and could not await EPA guidelines. By contrast, removal credits are not inevitable or mandatory; they exist purely at the discretion of the POTW. 33 U.S.C. 1317(b). But removal credits, if granted, can "not prevent sludge use or disposal . . . in accordance with section 405." *Id.* This is a flat prohibition, unlike Section 405(e). It ensures that removal credits, which are not inevitable, do not compromise sludge use or disposal, which is inevitable. In short, to the extent relevant, Section 405(e) actually supports the Third Circuit's decision.

4. THE THIRD CIRCUIT CORRECTLY DECIDED THAT EPA CANNOT AUTHORIZE REMOVAL CREDITS WHICH DIRECTLY VIOLATE SECTION 307(b)(1) OF THE CLEAN WATER ACT.

While CACI's petition is by no means clear, CACI appears to take issue with the Third Circuit's ruling that removal credits cannot exceed the amount of toxics *consistently*[22] removed by the POTW. CACI asserts that: 1) such matters are more appropriately resolved by a district court, and 2) as a policy matter, compliance with the POTW's NPDES permit[23] should suffice for credits even if it equates to less control than that required of direct dischargers. CACI Pet. 5-9.

CACI's complaints are more appropriately addressed to the Congress than to this Court. Section 509(b)(1)(C) of the Clean Water Act gives the courts of appeals exclusive jurisdiction to review EPA pretreatment standards such as those at issue here. 33 U.S.C. (Supp. II) 1369(b)(1)(C). Likewise, Section 307(b)(1) of the Act specifies that the indirect discharge of pollutants through a POTW must "not violate that effluent limitation or standard

22. CACI uses the term "daily and monthly limits" to refer to what the Third Circuit called "consistency" of pollutant removal. *See* CMA App. A-19 to A-20. For a discussion of the significance of both daily and monthly limits in achieving consistent removal, see CMA App. A-27 to A-32.

23. The Act requires each POTW and direct discharger to have a permit, commonly referred to as the "NPDES" permit. 33 U.S.C. 1311(a) and 1342. Permits for POTWs require secondary treatment. 33 U.S.C. 1311(b)(1)(B).

which would be applicable to such toxic pollutant if it were discharged by [a direct discharger]." 33 U.S.C. 1317(b)(1). This is an additional requirement to the NPDES permit for secondary treatment because secondary treatment "cannot deal adequately with toxic[s]." CMA App. A-7 to A-8 and n. 2.

Since effluent limitations for direct dischargers regulate both the overall amount of toxics discharged as well as the consistency of pollutant removal, Section 307 compels EPA to consider both amount and consistency of pollutant removal in authorizing removal credits. If the Chicago POTW can achieve the pollution reduction it claims, it should have no trouble meeting the consistency requirement. *See* CMA App. A-24, n. 12.[24] But if it cannot, neither the Third Circuit nor this Court can jettison the plain command of the statute in favor of CACI's preferred policy choice. However, EPA may be able to alleviate CACI's concern about the availability of removal credits with more carefully developed regulations. EPA urges this Court to refrain from granting certiorari while the agency attempts to do so. EPA Br. 10-11. We agree.

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24. CACI's real concern appears to be not so much consistency as the measurement and reporting requirements for credits. *Id.* and CACI Pet. 3. The latter, of course, are not at issue here. In addition, Chicago's removal credit application appears to run afoul of the requirement for a combined sewer overflow adjustment. *Cf.* NRDC Appendix A-5 to A-7 *with* CMA App. A-34 to A-42.

CONCLUSION

The petitions for certiorari should be denied. If the Court nonetheless grants any of the petitions, we respectfully urge the Court to specify which of the two principal questions (i.e., sludge or consistent removal requirements) the Court will review.

Respectfully submitted,

Frances Dubrowski
Counsel for the Natural Resources
Defense Council, Inc.
1350 New York Avenue, N.W.
Washington, DC 20005
(202) 783-7800

January 16, 1987

APPENDIX

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Office of General Counsel

June 25, 1986

Frances Dubrowski, Esq.
Natural Resources Defense Council
1350 New York Avenue, N.W.
Suite 300
Washington, D.C. 20005

Re: *NRDC v. EPA*, 7th Cir. (sic) (No. 84-3530)

Dear Fran:

Enclosed in response to your June 23, 1986 information request is the attached three-page listing of "POTWs with Approved Removal Credits." We believe that this responds fully to your request.

Please note that twelve POTWs have been granted removal credits, while EPA's petition for rehearing incorrectly stated that there were thirteen approvals. We will be filing an errata sheet with the court.

Sincerely,

Dov Weitman
Attorney

Enclosure

cc: All Counsel

POTWS WITH APPROVED REMOVAL CREDITS

1. *Buffalo, NY* — approved 7/19/85; combined sewer system (no CSO calculation).

   Pollutants: cadmium, zinc, chrome, copper, lead, nickel, silver, total metals

   Industry Categories (No. of Facilities):

Electroplating	(20)
Metal Finishing	(15)
Pharmaceutical Mfg.	(4)
Iron & Steel	(4)
Copper Forming	(1)

   Used 1984 regulation to calculate credits.

2. *Monroe County, NY* — approved 9/16/85; operates three plants — #1 is combined sewer system (no CSO calculation) and #s 2 and 3 have separate storm sewers.

   Pollutants: cadmium, chrome, copper, lead, silver, nickel, zinc, total metals.

   Industry Categories (No. of Facilities):

Electroplating/ Metal Finishing	(37)
Coil Coating	(1)
Aluminum Forming	(1)

   Used 1984 regulation to calculate credits.

3. *Memphis, TN* — approved 11/26/84; operates two plants, both have separate storm sewers.

   Pollutants: cadmium, cyanide, lead, chrome, copper, nickel, silver, zinc, arsenic.

   Industry Categories (No. of Facilities):

Electroplating	(9)
Metal Finishing	(5)
Battery Mfg.	(1)
Copper Forming	(1)

   Used 1984 regulation to calculate credits.

4. *Galesburg, IL* — approved 4/9/86; separate storm sewers.
   Pollutants: chrome.
   Industry Categories (No. of Facilities):
   Metal Finishing (1)
   Used 1984 regulation to calculate credits.

5. *Rockford, IL* — approved 5/30/84; separate storm sewers.
   Pollutants: chrome, copper, lead, nickel, zinc, total metals.
   Industry Categories (No. of Facilities):
   Electroplating (12)
   Metal Finishing (26)
   Used 1981 regulation to calculate credits.

6. *Speedway, IN* — approved 6/20/85; combined sewer system (no CSO calculation).
   Pollutants: chrome, zinc.
   Industry Categories (No. of Facilities):
   Metal Finishing (1)
   Used 1984 regulation to calculate credits.

7. *Kenosha, WI* — approved 9/6/85; separate storm sewers.
   Pollutants: lead, zinc, nickel, chrome.
   Industry Categories (No. of Facilities):
   Electroplating (1)
   Metal Finishing (5)
   Copper Forming (1)
   Foundries (2)
   Plastic Molding & Forming (1)
   Used 1984 regulation to calculate credits.

8. *Milwaukee MSD, WI* — approved 8/27/85; combined sewer system (no CSO calculation).
   Pollutants: chrome
   Industry Categories (No. of Facilities).
   Leather Tanning (15)
   Used 1984 regulation to calculate credits.

9. *Racine, WI* — approved 9/26/85; separate storm sewers.
   Pollutants: lead, zinc.
   Industry Categories (No. of Facilities):
   Electroplating (6)
   Metal Finishing (15)
   Used 1984 regulation to calculate credits.

10. *Sheboygan, WI* — approved 6/6/85; separate storm sewers.
    Pollutants: chrome
    Industry Categories (No. of Facilities):
    Electroplating (1)
    Metal Finishing (9)
    Aluminum Forming (2)
    Leather Tanning (2)
    Used 1984 regulation to calculate credits.

11. *Gulf Coast Waste Disposal Authority, TX,* — approved 7/12/85; separate storm sewers.
    Pollutants: oil & grease; ammonia.
    Industry Categories (No. of Facilities):
    Petroleum Refining (2)
    Used 1984 regulation to calculate

12. *Albuquerque, NM* — approved 9/21/85; separate storm sewers.
    Pollutants: cadmium, chrome, copper, lead, nickel, zinc, total metals.
    Industry Categories (No. of Facilities):
    Electroplating/ Metal Finishing (between 25-35)
    Used 1984 regulation to calculate credits.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Office of General Counsel

December 30, 1986

Frances Dubrowski, Esq.
Natural Resources Defense Council
1350 New York Avenue, N.W.
Suite 300
Washington, DC 20005

Re: *NRDC* v. *EPA*, No. 84-3530

Dear Fran:

This is in response to your August 4, 1986 letter requesting information concerning POTWs which have been granted or have applied for removal credits authority.

A. *POTWs granted removal credits authority*

1. As best as we can determine, there has been no overlap or "doublecounting" of electroplaters and metal finishers.

2. Since pounds of pollutants are not set forth in removal credits applications, EPA does not have information on the number of pounds involved in each removal credit.

3. 22 facilities (21 electroplaters and 1 non-ferrous metals) have removal credits in Albuquerque, N.M. (The original estimate was based upon a review of the permit application. The current information is based upon a recently conducted on-site audit.)

4. The information provided on June 25, 1986 has not changed.

B. *POTWs that have applied for removal credits authority*

The information set forth below is believed to be generally accurate. They may be some minor errors; if any, however, we believe they are minimal. We list below each of 14 POTWs who have applied, and separately answer your questions for each city.

Please note that none of these POTWs performed a CSO adjustment explicitly. (However, some of them do not have combined sewers.)

NAME	DATE OF APPLICATION	POLLUTANTS COVERED	FACILITIES COVERED	COMBINED SEWERS?	REGS USED
Hartland ME	6/28/84	Cr	LT (1)	?	1981
Kanawanda NY	?	Phenol	I&S (1)	?	1984?
Manitowic WIS	2/8/84	Cr, Cu, Pb, Hg, Cn	EP (1) MF (12) Inorg (1) NFM (1)	No	1981
Sauget IL	10/29/85	Cu, Pb, Ni, Zn, Cd, Cr	CF (1) NFM (2)	Yes	1984
Watertown WIS	6/84	Cd, Cr, Cu, Ni, Zn	EP (2) MF (2)	Yes	1981
Middletown OH	1/24/84	Ammonia Phenol	I&S (1)	Yes	1984?
Indianapolis IN	12/85	N, Cr, Cn, Cu, Ni, Pb, Phenol, Zn, O&G, Metals	I&S (1) E&EC (1) PR (3) Timber (3) PE (1) EP/ MF (36)	Yes	1984
Freeport IL	10/7/85	Cu, Zn, Cd, Ni, Cr	MF (1)	No	1984
Fond du Lac WIS	5/31/85	Cr	EP (5) MF (4) LT (1)	?	1984

NAME	DATE OF APPLICATION	POLLUTANTS COVERED	FACILITIES COVERED	COMBINED SEWERS?	REGS USED
S. Milwaukee WIS	8/28/85	Cr	LT (1) MF (4)	?	1984
Grand Haven MI	1/84	Cr	LT (1)	?	1981
Chicago IL	6/28/84	Cr, Cu, Cn, Pb, O&G, Zn, Phenol Metals	EP (142) MF (137) I&S (39)	Yes	1984
Orange County CA	3/84	Cd, Pb, Ni, Zn, Ag	EP (169) MF (76)	No	1981
Stockton CA	1/30/85	Cd, Cr, Cu, Pb, Ni, Zn Ag	EP (?)	No	1984

If you have any further questions, please call.

Sincerely,

Dov Weitman

EFFLUENT GUIDELINES DIVISION
FINAL RULES - PRIMARY CATEGORIES
(1979 - Present)

NATIONAL PRETREATMENT STANDARDS
COMPLIANCE DEADLINES

11/12/85
(Revised)

INDUSTRIAL TECHNOLOGY DIVISION PROMULGATED CATEGORICAL RULES/PSES COMPLIANCE DEADLINES[1]

INDUSTRY	PSES COMPLIANCE DEADLINE
ALUMINUM FORMING	10/24/86
BATTERY MANUFACTURING	03/09/87
COAL MINING	NO KNOWN INDIRECT DISCHARGERS
COIL COATING Phase I	12/01/85
COIL COATING Phase II (Canmaking)	11/17/86
COPPER FORMING	08/15/86
ELECTRICAL/ELECTRONIC COMPONENTS	07/01/84 A
Phase I	11/08/85 A
ELECTRICAL/ELECTRONIC COMPONENTS Phase II	07/14/86 B
ELECTROPLATING	04/27/84 C 06/30/84 C 07/15/86 C
INORGANIC CHEMICALS Phase I	08/12/85 D

1. Irrelevant material in original has been omitted here (i.e., 40 C.F.R. Part, date of Administrator's signature of rule, Federal Register citation, effective date of rule).

INDUSTRIAL TECHNOLOGY DIVISION
PROMULGATED CATEGORICAL RULES/PSES
COMPLIANCE DEADLINES

INDUSTRY	PSES COMPLIANCE DEADLINE
INORGANIC CHEMICALS Phase II	08/22/87 E 06/29/85 E 07/20/80 E
IRON & STEEL MANUFACTURING	07/10/85
LEATHER TANNING & FINISHING	11/25/85
METAL FINISHING	06/30/84 F 07/10/85 F 02/15/86 F
NONFERROUS METALS Phase I	03/09/87
NONFERROUS METALS Phase II	09/20/88
NONFERROUS METALS FORMING	08/23/88
ORE MINING	NO KNOWN INDIRECT DISCHARGERS
PESTICIDES	11/10/88
PETROLEUM REFINING	03/23/80
PHARMACEUTICALS	10/27/86
PLASTICS MOLDING & FORMING	NO CATEGORICAL STANDARDS H
PORCELAIN ENAMELING	11/25/85
PULP & PAPER	07/01/84
STEAM-ELECTRIC POWER PLANTS	07/01/84

INDUSTRIAL TECHNOLOGY DIVISION PROMULGATED CATEGORICAL RULES/PSES COMPLIANCE DEADLINES

INDUSTRY	PSES COMPLIANCE DEADLINE
TEXTILE MILLS	NO CATEGORICAL STANDARDS J
TIMBER	01/26/84 K

KEY:

A. *Electrical/Electronic Components* (Phase I):
July 1, 1984 for TTO (Subparts A & B); November 8, 1985 for Arsenic (Subpart B).

B. *Electrical/Electronic Components* (Phase II):
Compliance date of July 14, 1987 corrected to read July 14, 1986 (Subpart C — to control specific toxic metals, flouride, and TTO).

C. *Electroplating:*
4/27/84 for Metals and Cyanide (nonintegrated plants); 6/30/84 for Metals and Cyanide (integrated plants); 7/15/86 for TTO based on management practices followed by precipitation/clarification).

D. *Inorganic Chemicals* (Phase I):
PSES established only for Subparts F1, AH, AJ, AU.

E. *Inorganic Chemicals* (Phase II):
July 20, 1980 for Subparts A, B, L, AL, AR, BA, and BC; August 22, 1987 for Subparts AJ, AU, BL, M, BN, and BO, except for discharges from copper sulfate or nickel sulfate manufacturing operations;
June 29, 1985 for discharges from copper sulfate or nickel sulfate manufacturing operations and all Subparts in Part 415 not listed above.

F. *Metal Finishing:*

6/30/84 for TTO limit based on management practices only, except for plants covered by Part 420; 7/10/85 for TTO limit based on management practices only for plants covered by Part 420; 2/15/86 for Metals, Cyanide, and TTO based on management practices followed by precipitation/clarification).

G. *Pharmaceuticals:*

The effective date does not apply to provisions which allows (sic) facilities not using or generating cyanide to certify to that effect instead of monitoring for cyanide (Sections 439.14-17, .24-.27, .34-.37, and .44-.47).

H. *Plastics Molding and Forming:*

No categorical standards have been established; all indirect dischargers are required to comply with the General Pretreatment Regulation (40 CFR Part 403).

I. *Pulp and Paper:*

The effective date does not apply to sections that allow facilities not using chlorophenolic biocides or zinc hydrosulfite to certify to that effect instead of monitoring for PCB an (sic) TCP, which are effective May 18, 1983 (48 FR 31403, July 8, 1983; Reporting and Recordkeeping Requirements, OMB Approval, Technical Amendments).

J. *Textile Mills:*

No categorical standards have been established; all indirect dischargers are required to comply with the General Pretreatment Regulation (40 CFR Part 403).

K. *Timber Products Mfg.:*

Compliance established for Subparts F, G, and H only; the regulation reaffirms compliance with the General Pretreatment Regulation (40 CFR Part 403) for all other remaining Subparts.

Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-239 and 86-608

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHEMICAL MANUFACTURERS ASSOCIATION, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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8 pp

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-239

CHEMICAL MANUFACTURERS ASSOCIATION, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

No. 86-608

CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES IN OPPOSITION

This supplemental brief is filed pursuant to Rule 22.6 of the Rules of this Court to notify the Court of a development occurring subsequent to the filing of our brief in opposition that may affect the Court's disposition of the two petitions for a writ of certiorari.

On February 4, 1987, Congress enacted into law, over the President's veto, the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 *et seq.* Section 406 of that Act amends Section 405(d) of the Clean Water Act, 33 U.S.C. 1345(d), the meaning of which is the subject of the two petitions. In our brief in opposition, we argue that the two petitions should be denied because EPA rulemaking efforts now in progress should eventually alleviate the principal burdens created by the decision. In our view, the new statutory amendments make this Court's review even less appropriate.

Section 406(a) of the Water Quality Act of 1987 amends Section 405(d)(2) of the Clean Water Act to provide that EPA should promulgate sludge rules by August 31, 1987, for certain toxic pollutants and by June 15, 1988, for others. In addition, Section 406(e) of the 1987 Act stays until August 31, 1987, the relevant portion of the decision of the court of appeals in this case with respect to those publicly owned treatment works that either received removal credits prior to February 4, 1987, or that applied for removal credits and whose application was pending on February 4th, and is approved by August 31, 1987. Finally, Section 406(e) provides that "[t]he Administrator shall not authorize any other removal credits under such Act until the Administrator issues the [sludge] regulations required by paragraph (2)(A)

(ii) of section 405(d) of [the Clean Water] Act, as amended."*

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1987

* A copy of the pertinent provision of the Water Quality Act of 1987 is appended.

APPENDIX

SEC. 406. SEWAGE SLUDGE.

(a) IDENTIFICATION AND REGULATION OF TOXIC POLLUTANTS.—Section 405(d) is amended—

(1) by inserting "(1) REGULATIONS.—" before "The Administrator, after";

(2) by striking "(1)", "(2)", and "(3)" and inserting in lieu thereof "(A)", "(B)", and "(C)", respectively; and

(3) by adding at the end the following new paragraphs:

"(2) IDENTIFICATION AND REGULATION OF TOXIC POLLUTANTS.—

"(A) ON BASIS OF AVAILABLE INFORMATION.—

"(i) PROPOSED REGULATIONS.—Not later than November 30, 1986, the Administrator shall identify those toxic pollutants which, on the basis of available information on their toxicity, persistence, concentration, mobility, or potential for exposure, may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each such pollutant for each use identified under paragraph (1)(A).

"(ii) FINAL REGULATIONS.—Not later than August 31, 1987, and after op-

portunity for public hearing, the Administrator shall promulgate the regulations required by subparagraph (A)(i).

"(B) OTHERS.—

"(i) PROPOSED REGULATIONS.—Not later than July 31, 1987, the Administrator shall identify those toxic pollutants not identified under subparagraph (A)(i) which may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each pollutant for each such use identified under paragraph (1)(A).

"(ii) FINAL REGULATIONS.—Not later than June 15, 1988, the Administrator shall promulgate the regulations required by subparagraph (B)(i).

"(C) REVIEW.—From time to time, but not less often than every 2 years, the Administrator shall review the regulations promulgated under this paragraph for the purpose of identifying additional toxic pollutants and promulgating regulations for such pollutants consistent with the requirements of this paragraph.

"(D) MINIMUM STANDARDS; COMPLIANCE DATE.—The management practices and numerical criteria established under subpara-

graphs (A), (B), and (C) shall be adequate to protect public health and the environment from any reasonably anticipated adverse effects of each pollutant. Such regulations shall require compliance as expeditiously as practicable but in no case later than 12 months after their publication, unless such regulations require the construction of new pollution control facilities, in which case the regulations shall require compliance as expeditiously as practicable but in no case later than two years from the date of their publication.

"(3) ALTERNATIVE STANDARDS.—For purposes of this subsection, if, in the judgment of the Administrator, it is not feasible to prescribe or enforce a numerical limitation for a pollutant identified under paragraph (2), the Administrator may instead promulgate a design, equipment, management practice, or operational standard, or combination thereof, which in the Administrator's judgment is adequate to protect public health and the environment from any reasonably anticipated adverse effects of such pollutant. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

"(4) CONDITIONS ON PERMITS.—Prior to the promulgation of the regulations required by paragraph (2), the Administrator shall impose conditions in permits issued to publicly owned treatment works under section 402 of this Act or take

such other measures as the Administrator deems appropriate to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge.

"(5) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section is intended to waive more stringent requirements established by this Act or any other law.".

(b) MANNER OF SLUDGE DISPOSAL.—Section 405 (e) is amended to read as follows:

"(e) MANNER OF SLUDGE DISPOSAL.—The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.".

(c) IMPLEMENTATION THROUGH PERMITS.—Section 405 is further amended by adding at the end thereof the following:

"(f) IMPLEMENTATION OF REGULATIONS.—

"(1) THROUGH SECTION 402 PERMITS.—Any permit issued under section 402 of this Act to a publicly owned treatment works or any other treatment works treating domestic sewage shall include requirements for the use and disposal of sludge that implement the regulations established pursuant to subsection (d) of this section, unless such requirements have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act,

part C of the Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator, where the Administrator determines that such programs assure compliance with any applicable requirements of this section. Not later than December 15, 1986, the Administrator shall promulgate procedures for approval of State programs pursuant to this paragraph.

"(2) THROUGH OTHER PERMITS.—In the case of a treatment works described in paragraph (1) that is not subject to section 402 of this Act and to which none of the other above listed permit programs nor approved State permit authority apply, the Administrator may issue a permit to such treatment works solely to impose requirements for the use and disposal of sludge that implement the regulations established pursuant to subsection (d) of this section. The Administrator shall include in the permit appropriate requirements to assure compliance with the regulations established pursuant to subsection (d) of this section. The Administrator shall establish procedures for issuing permits pursuant to this paragraph.

"(g) STUDIES AND PROJECTS.—

"(1) GRANT PROGRAM; INFORMATION GATHERING.—The Administrator is authorized to conduct or initiate scientific studies, demonstration projects, and public information and education projects which are designed to promote the safe and beneficial management or use of sewage sludge for such purposes as aiding the restora-

tion of abandoned mine sites, conditioning soil for parks and recreation areas, agricultural and horticultural uses, and other beneficial purposes. For the purposes of carrying out this subsection, the Administrator may make grants to State water pollution control agencies, other public or nonprofit agencies, institutions, organizations, and individuals. In cooperation with other Federal departments and agencies, other public and private agencies, institutions, and organizations, the Administrator is authorized to collect and disseminate information pertaining to the safe and beneficial use of sewage sludge.

"(2) AUTHORIZATION OF APPROPRIATIONS.—For the purposes of carrying out the scientific studies, demonstration projects, and public information and education projects authorized in this section, there is authorized to be appropriated for fiscal years beginning after September 30, 1986, not to exceed $5,000,000."

(d) ENFORCEMENT.—(1) Section 308(a)(4) is amended by inserting "405," before "and 504".

(2) Section 505(f) is amended by striking out "or" before "(6)" and by inserting before the period ". or (7) a regulation under section 405(d) of this Act,".

(3) Section 509(b)(1)(E) is amended by striking out "or 306" and inserting in lieu thereof "306, or 405".

(e) REMOVAL CREDITS.—The part of the decision of Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, No. 84-3530 (3d. Cir. 1986), which addresses section 405(d) of the Federal Water Pollution Control Act is stayed until August 31, 1987, with respect to—

(1) those publicly owned treatment works the owner or operator of which received authority to revise pretreatment requirements under section 307(b)(1) of such Act before the date of the enactment of this section, and

(2) those publicly owned treatment works the owner or operator of which has submitted an application for authority to revise pretreatment requirements under such section 307(b)(1) which application is pending on such date of enactment and is approved before August 31, 1987.

The Administrator shall not authorize any other removal credits under such Act until the Administrator issues the regulations required by paragraph (2)(A)(ii) of section 405(d) of such Act, as amended by subsection (a) of this section.

(f) CONFORMING AMENDMENTS.—Section 405(d) is further amended—

(1) by inserting "REGULATIONS.—" after "(d)";

(2) by indenting paragraph (1) (as designated by subsection (a)(1) of this section) and aligning such paragraph with paragraph (3), as added by subsection (a)(3); and

(3) in such paragraph (1) by aligning subparagraphs (A), (B), and (C) (as designated by subsection (a)(2) of this section) with subparagraph (C) of paragraph (2), as added by subsection (a)(3) of this section.

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BRIEF AMICUS CURIAE OF THE MUNICIPAL PRETREATMENT GROUP IN SUPPORT OF THE PETITIONS FOR CERTIORARI

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The City of Albuquerque, Buffalo Sewer Authority, Metropolitan Sanitary District of Greater Chicago, Gulf Coast Waste Disposal Authority (Texas), City of Indianapolis, City of Memphis, Milwaukee Metropolitan Sewerage District, and Sanitary District of Rockford, Illinois (hereinafter "The Municipal Pretreatment Group") file this brief, *amicus curiae* in support of the petitions for certiorari filed in this case. All parties of record have given their consent to this filing.

STATEMENT OF INTEREST OF THE MUNICIPAL PRETREATMENT GROUP

The Municipal Pretreatment Group has a substantial interest in the outcome of this case. The Municipal Pretreatment Group is an unincorporated coalition of municipalities and special purpose sewerage districts, all of which own and operate publicly owned waste water treatment works ("POTW"s). These municipal authorities either have approved "removal credit" programs under Section 307(b) of the Clean Water Act, 33 U.S.C. § 1317(b) (1982), or have programs under development and in some cases awaiting only final agency approval. Its members, along with other interested cities, constitute the Conference on Removal Credits of the Association of Metropolitan Sewerage Agencies ("AMSA"), a national non-profit association of 100 municipal agencies and special purpose districts which own and operate nearly all of the nation's large POTWs serving a combined population of over 80 million people.

AMSA was a petitioner in the Third Circuit's earlier review of "removal credits", which resulted in a decision upholding the United States Environmental Protection Agency's (EPA) removal credit regulation. *National Association of Metal Finishers v. U.S. Environmental Protection Agency*, 719 F.2d 624 (3rd Cir. 1983) *rev'd in part, sub nom. Chemical Manufacturers Association v. National Resources Defense Council, Inc.*, 470 U.S. 116 (1985).

The Municipal Pretreatment Group filed a motion for late intervention with the Third Circuit in the instant case after the decision was issued but before the denial of rehearing. That motion was denied.

Under Section 307(b) of the Clean Water Act, EPA promulgates categorical pretreatment standards for industrial discharges to POTWs. Congress authorized POTWs to grant "removal credits" to industrial dis-

chargers where pretreatment by industry and subsequent treatment at the POTW would result in duplicative treatment. Removal credits therefore modify categorical pretreatment standards promulgated by the EPA. These credits have become an integral part of the pretreatment programs, either in place or under development, in many industrial communities throughout the country.

The decision of the Third Circuit struck down EPA's removal credit regulations on, *inter alia*, the grounds that EPA has not promulgated sufficiently comprehensive regulations governing the use or disposal of municipal sewage sludge under Section 405 of the Act, 33 U.S.C. § 1345.

The decision below would invalidate all EPA approved pretreatment programs which include removal credits. The decision would also indefinitely suspend the authority of POTWs to grant removal credits in the future. The effect of the decision, if permitted to stand, would be to disrupt years of planning, negotiations, and commitment of resources by POTWs in the development of effective local pretreatment programs.[1]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES ISSUES OF NATIONAL IMPORTANCE

The decision of the Third Circuit, if allowed to stand, would invalidate EPA's removal credit regulations and thereby dismantle for an indefinite period an essential element of the Clean Water Act's pretreatment program. As a result of that decision, POTWs such as members of the Municipal Pretreatment Group are threatened with substantial and serious disruption of their pretreatment programs.

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[1] Other aspects of the decision find EPA's removal credit program deficient for reasons unrelated to § 405 and could be cured by EPA without necessarily invalidating existing removal credits, or unduly disrupting local pretreatment programs.

These public agencies have developed local pretreatment programs as required by Section 402(b)(8) of the Clean Water Act, 33 U.S.C. § 1342(b)(8). As an integral part of these pretreatment programs, they have applied for and received approval (or have applications under development and pending approval) under 40 C.F.R. § 403.7 to grant "removal credits" to industrial concerns which discharge treated waste water effluent into their POTW systems ("indirect dischargers"). Where already granted, approval for such credits is reflected in NPDES discharge permits issued under Section 402 of the Act, 33 U.S.C. § 1342.

These agencies have invested considerable public resources in the development of pretreatment programs tailored to the particular facts and circumstances of the communities they serve. These investments include sampling, monitoring and reporting with respect to POTW removal capabilities, indirect dischargers' pretreatment systems, receiving water quality and sewage sludge characteristics; developing necessary local industrial waste ordinances; building staff and laboratory capacity for the implementation of the local pretreatment effort; cooperation and negotiation with industrial dischargers; application to and review by state permitting authorities and EPA; and involvement of the public through comment and hearing procedures.[2]

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[2] The experience of the Sanitary District of Rockford, Illinois is illustrative. The District is a unit of local government under the Illinois Constitution and is established pursuant to statutory authority independent of other municipal governments. It first submitted an application for removal credits in draft form to EPA in 1980 based upon its monitoring of influent and effluent data over the previous year. Meanwhile, in preparation for submitting a final application, the District staff substantially revised its local pretreatment ordinance and obtained approval of its Board of Trustees for such changes. This was accomplished in late 1982. Because of ongoing changes in EPA regulations and surrounding uncertainty it was not until September 2, 1983 that the

To the extent that removal credit authority is an integral component of an agency's pretreatment strategy, the Third Circuit's decision in this case effectively destroys these investments of time, money and public credibility made over many years.

The Municipal Pretreatment Group will be particularly affected by that aspect of the decision which, read literally, precludes *any* removal credit program until EPA issues comprehensive sludge management regulations under Section 405(d) of the Act, 33 U.S.C. § 1345(d). With this one stroke of the pen, the Court has invalidated elements of local ordinances, industry/POTW contracts, pretreatment program approvals, and NPDES permits.

Many POTWs have relied upon the participation of ratepaying industrial indirect dischargers. Without the authority to grant removal credits, when appropriate, local industries which, under the decision below, would now be required to meet categorical pretreatment standards may see little advantage to discharging into POTWs and may elect to become direct dischargers. More significant than the loss of revenue to municipal agencies, would be the undesirable consequences of industrial firms becoming direct dischargers rather than being a part of regional systems with better monitoring and control features, one of the principal goals of the Clean Water Act.

District submitted a final application to EPA based upon more recent data and monitoring. The development and submittal of the application for removal credits, extending as it did over a number of years involved extensive staff and management time and a major diversion of scarce resources.

That application was not approved until May 30, 1984 and it was not until January of 1986 that removal credits were incorporated into the District's NPDES permit—approximately six years after the first application was submitted in draft form. As finally approved, the program permits the District to grant removal credits for copper, zinc, chromium, nickel, and lead to 39 separate local metal plating and metal finishing industries. All of these metals are subject to State regulations which limit land application of sludge.

If such industries become direct dischargers, the enforcement and monitoring responsibilities for their effluent would be transferred to the state and Federal environmental protection agencies, thereby increasing the burden on those agencies which may lack the staff and the funding to handle such an increase in work load.

Another potential consequence of the decision below is industry closure. If POTWs are not able to grant removal credits many local industries, particularly those with aging physical plants, may decide to abandon these facilities rather than make the substantial capital improvements necessary to comply with categorical pretreatment standards. If this occurs, the loss of jobs and the erosion of the economic and tax base in these communities will be significant.

II. THE DECISION BELOW UPSETS EPA'S LONG-STANDING INTERPRETATION OF THE CLEAN WATER ACT RELIED UPON BY POTWs.

Prior to the decision below, EPA has interpreted Section 307(b) of the Act to permit local removal credit programs as long as the POTW's chosen method of sludge use or disposal was in compliance with any applicable federal, state or local sludge requirements. (*See*, Federal Respondent's Brief, p. 4). This interpretation is reasonable and consistent with the language of the statute, and permitted the effectuation of the removal credits concept by interested POTWs. The Municipal Pretreatment Group relied on this interpretation in the development of local programs, just as industries relied on local removal credits in planning for their compliance with categorical pretreatment standards.

The decision of the Third Circuit now makes the issuance of additional sludge management guidelines under Section 405(d) a pre-condition for the issuance of removal credits under Section 307(b), effectively rendering that portion of Section 307 a nullity in the interim,

a result Congress could not have intended. The Clean Water Act, through express language makes the removal credit program discretionary with local POTWs under Section 307(b)(1). Yet the Third Circuit's decision removes that discretion entirely despite the fact that, again through express language, the Act makes determinations with respect to sludge disposal or use a matter of local discretion under Section 405(e), 33 U.S.C. § 1345(e), and regardless of the POTW's compliance with all local, state and Federal requirements currently applicable to sludge management practices.

Nothing in the express language of either Section 307(b) or Section 405(d) requires promulgation of sludge regulations for all pollutants and all use or disposal options before any removal credit programs can be implemented. Congress anticipated that the Federal sludge guidelines would evolve over time, and expressly provided not just for initial rulemaking by a date certain, but also for additional promulgations "from time to time thereafter". 33 U.S.C. § 405(d). Had Congress intended to delay the removal credit program until all Section 405(d) rulemakings had been completed, it could easily have provided some explicit trigger mechanism in Section 307(b), or elsewhere in the Act. It did not.

Furthermore, by tying the removal credit authority in Section 307(b) to only federally promulgated sludge regulations under Section 405(d), the Third Circuit has failed to give proper effect to Congress' intent that, in the absence of a Section 405(d) guideline, "the manner of disposal or use of sludge is a local determination". 33 U.S.C. § 405(e).

Section 510 of the Act, 33 U.S.C. § 1370 expressly provides that nothing in the Act shall prohibit states from adopting and enforcing pollution abatement measures provided that the state standards are not less stringent than standards promulgated under the Act. In this case, where there are no federally promulgated sludge stand-

ards that are more stringent, the Act clearly states that state or local laws and regulations shall prevail.[3]

It is entirely possible that existing limitations on sludge disposal in some states will be more stringent than some future EPA promulgated regulations under Section 405 (d). In such a case it is the stricter state regulations already in existence which will govern. The Third Circuit's decision essentially ignores these state and local limitations and the important role they play and may continue to play in the future in protecting the public health.

A particularly burdensome aspect of the decision below is that it leaves both public agencies and indirect dischargers in a legal "no man's land" of sudden noncompliance. Both have relied in good faith on the availability of removal credits. Now, for some indefinite future until Section 405(d) sludge regulations are promulgated, both are potentially subject to enforcement proceedings. Industrial dischargers that completed capital equipment programs in reliance on credits may be immediately out of compliance with categorical pretreatment standards. POTWs, no longer able to grant credits, will be obligated under the terms of their pretreatment program approvals to enforce the categorical standards against industry, or risk enforcement themselves from EPA, state agencies and citizen suits. These significant new enforcement obligations will require increased commitments of resources and personnel. POTWs will have to put local industries on compliance schedules, monitor that compliance, and prosecute those who cannot comply.

The government's opposition to certiorari essentially ignores this aspect of the case. While maintaining that

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[3] For example, the state of Illinois has regulations in place which limit the land application of sludge containing any of the metals for which the Sanitary District of Rockford has authority to grant removal credits. Similarly, the City of Racine, Wisconsin was granted authority to issue removal credits for chromium, zinc and lead, all of which are subject to state sludge regulations.

the Third Circuit's decision is erroneous, and recognizing the hardship it will impose on the regulated community (*See*, Federal Respondent's, Brief, pp. 7, 9-10), the government nonetheless argues against further review on the ground that further "rulemaking efforts now in progress should eventually alleviate the principal burdens created by the decision." (*Id.*, p. 7). EPA's efforts to promulgate sludge regulation under Section 405(d) have already been "in progress" for many years. Proposed rules are expected no earlier than August of 1987. Final rules will undoubtedly require an additional six months to a year to be promulgated if EPA's experience on major regulations is a reliable indicator. Moreover, the odds are great that the final regulations will be challenged judicially, adding another year or two to the process. Thus, for an indefinite and lengthy period, the POTWs and industries effected by the decision below remain at risk of civil and even criminal enforcement proceedings. EPA may eventually alleviate this burden prospectively, but it has done nothing, and offers nothing in its Opposition, to remedy the immediate dilemma faced by both POTWs and their indirect industrial dischargers.

CONCLUSION

The decision below raises issues of national significance. If that decision stands, the removal credit portion of the pretreatment program will be indefinitely suspended and POTWs throughout the country will be faced with the burden of substantially altering their local pretreatment programs. In addition, the significant time and resources POTWs have already committed to the development of programs in compliance with EPA's 1984 regulations will have been largely for naught.

The Third Circuit's decision is also contrary to EPA's reasonable and longstanding interpretation of the Act—an interpretation relied upon by municipalities and industry in the development of effective industrial pretreatment programs.

For all of the foregoing reasons, the Municipal Pretreatment Group urges the Court to grant the petitions for a writ of certiorari.

Respectfully submitted,

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